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IN THE

Supreme Court of the United States

OCTOBER TERM--1942.

JERSEY CENTRAL POWER & LIGHT COMPANY, Petitioner, v. FEDERAL POWER COMMISSION, Respondent.	No. 299.
NEW JERSEY POWER & LIGHT COMPANY, Petitioner, v. FEDERAL POWER COMMISSION, Respondent.	No. 329.

BRIEF FOR PETITIONERS.

Foreword.

Petitioners Jersey Central Power & Light Company and New Jersey Power & Light Company seek review of an order of the Federal Power Commission which affects both petitioners, in the manner hereinafter described. Before the Federal Power Commission, and in the Court below, the cases were considered upon a single record. The case of each petitioner before the Federal Power Commission was conducted separately, however, and separate petitions for

review and separate briefs were filed in the Court below, which entered separate judgments. (R. 1135). Separate petitions for writs of certiorari were filed in this Court, by Jersey Central Power & Light Company at No. 299, and by New Jersey Power & Light Company at No. 329, October Term, 1942. Although the issues before this Court are not completely identical with respect to each petitioner, in large part they involve the same question, namely, whether Jersey Central Power & Light Company was a "public utility" as defined in the Federal Power Act (49 Stat. 847, 16 U. S. C. A. §791(a)). Accordingly, it was the view of petitioners that the convenience of the Court would be served if a joint brief, rather than separate briefs, were filed.

The use of italics in quoted excerpts indicates emphasis supplied by the writers of this brief.

Reference to Opinions Below.

The opinion of the Federal Power Commission is reported unofficially at 30 P. U. R. (N. S.) 33 (1939) and appears at R. 936-940. The opinion of the Circuit Court of Appeals for the Third Circuit is reported at 129 F. (2nd) 183 (1942) and appears at R. 1113-1134.

Statement of Jurisdiction.

The Federal Power Commission on July 18, 1939 (R. 936) determined that petitioner New Jersey Power & Light Company (hereinafter referred to as "New Jersey Power") had violated Section 203(a) of the Federal Power Act (49 Stat. 849, 16 U. S. C. A. §824b (a)) by reason of its acquisition of 341,350 shares of common stock of Jersey Central Power & Light Company (hereinafter referred to as "Jersey Central") without first having secured authorization of the Commission to do so. The Federal Power Act

(49 Stat. 847, 16 U. S. C. A. §791 (a)), hereinafter sometimes referred to as the "Act," is the federal statute involved in this case, and the jurisdiction of this Court is invoked under Section 313 (b) thereof (49 Stat. 860, 16 U. S. C. A. §825*l* (b)) and Section 240 of the Judicial Code, as amended (43 Stat. 938, §1, 28 U. S. C. A. §347). The Circuit Court of Appeals held that the Determination of Federal Power Commission was an order reviewable under Section 313(b) of the Act (R. 1121-1126). See *Federal Power Commission* v. *Pacific Power and Light Company*, 307 U. S. 156 (1939); *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125 (1939); and *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407 (1942). The petitions for writ of certiorari to review the decision of the Circuit Court of Appeals herein were granted by this Court on October 12, 1942.

Statement of the Case.

(a) Statement of questions involved.

1. Does an electric company, which does business entirely in one state, and which has never sold or destined any electric energy to anyone outside that state, become a "public utility", within the meaning of the Act, if it supplies some energy (when, as and if it has a surplus) to another electric company within the same state for that company's use and subject to control exclusively by that company, if the latter company has an emergency connection with a third company at the state border and if it may be possible to show, by studies of electrical phenomena, that on a few occasions, and under certain conditions wholly beyond the control of the first-mentioned company, small quantities of electric energy of no commercial significance, which "slopped over" from the wires of the second com-

pany and found their way into the system of the third company in an adjoining state, were actually generated by the first-mentioned company?

2. If the first-mentioned company, its facilities and operations, are subject to regulation by the state in which it is doing business, is it subject to regulation under the Act?

3. Is a "public utility", as defined in the Act, required, in view of the provisions in subsection (a) of Section 201 of the Act, to secure authorization from the Federal Power Commission before acquiring shares of stock in another "public utility", where both companies are corporations organized and operating in the same state, and there exists in such state a governmental body having comprehensive regulatory powers over both companies and, in particular, over the acquisition and transfer of the stock in question, which acquisition and transfer the state body has formally approved?

(b) Nature of proceedings below.

On June 7, 1938, the Federal Power Commission issued an order (R. 1), served on both petitioners, directing petitioner New Jersey Power to submit in writing detailed information concerning the reported acquisition by it on March 14, 1938, of 341,350 shares of common stock of Jersey Central ". . . in apparent violation of Section 203(a) of the Federal Power Act". That section provides generally that no "public utility", as defined in the Act, shall acquire the securities of any other "public utility", without first having secured an order of the Commission authorizing it to do so. New Jersey Power admitted that it was a "public utility", but denied that Jersey Central was a "public utility", and averred that no approval by the Federal Power Commission of such acquisition was required.

The answer of New Jersey Power further averred that its acquisition of the stock had been made after obtaining the approval of the Board of Public Utility Commissioners of New Jersey and a copy of the decision of that Board granting such approval was annexed (R. 5-8). Accordingly, New Jersey Power denied that the acquisition violated Section 203(a) or any other provision of the Act, and denied that it was required to secure authorization from the Federal Power Commission.

By order dated July 5, 1938, the Commission directed that hearings be held in the matter. Jersey Central, named in the caption of the order to show cause, and having been served with notice of the proceeding, petitioned to intervene, denying that it was a "public utility" subject to the jurisdiction of the Commission (R. 15). By order of the Examiner, Jersey Central was made a party to the proceeding (R. 19).

Following the hearings, the Commission, on July 18, 1939, entered its Determination, which held that Jersey Central was a "public utility", as defined in the Act, and that the acquisition by New Jersey Power of stock of Jersey Central was, despite the approval of such acquisition by the Board of Public Utility Commissioners of New Jersey, in violation of Section 203(a) of the Act.

The basis for the assertion of jurisdiction by the Commission is contained in the following finding:

> "The transmission facilities owned and operated by Jersey Central Power & Light Company extending from its substation adjacent to its generating plant in South Amboy, New Jersey, to the south bank of the Raritan River in said State are transmission facilities utilized for the transmission of electric energy in interstate commerce, and therefore, Jersey Central Power & Light Company is a 'public utility' within the meaning of the Federal Power Act;" (R. 939-940).

The facilities referred to above constitute a line about seven-eighths of a mile long (R. 286). While extensive testimony had been taken at the hearings (which lasted for ten trial days) of all phases of Jersey Central's operations, all its facilities and its several connections with other companies, the only facility found by the Commission to be subject to its jurisdiction was the line described in the above finding. On that basis the Commission asserted jurisdiction over Jersey Central.

Within the statutory period, petitions for rehearing (R. 941) were filed with the Commission and denied (R. 963). Following petitions for review under Section 313(b) of the Act (49 Stat. 860, 16 U. S. C. A. §825*l* (b)), the Circuit Court of Appeals for the Third Circuit affirmed the order of the Commission on May 25, 1942 (R. 1135). As stated previously, this Court granted the petitions for certiorari herein on October 12, 1942.

(c) Character of businesses of New Jersey Power and Jersey Central.

Petitioner New Jersey Power is a New Jersey corporation engaged in the business of supplying electricity and gas at retail to consumers in New Jersey. New Jersey Power is subject to regulation by the Board of Public Utility Commissioners of New Jersey (N. J. S. A. 48:2-13), and is also a "public utility", as defined in the Act, by reason of sales of electricity at wholesale directly to companies outside New Jersey.

Petitioner Jersey Central is likewise a New Jersey corporation engaged in the business of selling electricity and gas at retail. *All its customers are in New Jersey* (R. 274) *and neither the company's lines nor its franchise area extend to the border of another state* (R. 296). The Court below expressly found that Jersey Central does not sell any elec-

tric energy whatsoever directly in interstate commerce (R. 1128).

The facilities and operations of Jersey Central are likewise fully subject to regulation by the Board of Public Utility Commissioners of New Jersey (R. 290-2; N. J. S. A. 48:2-13). The record shows in detail the powers exercised by the Board (R. 290-2), which has jurisdiction over rates, accounts, standards of service, extensions of facilities, sales, mortgages, issues and transfers of securities, mergers, and the like.* *The Board passed upon and approved the very transaction which gave rise to this proceeding* (R. 5-8, 291), *and the Court below found that the Board had jurisdiction to do so* (R. 1134). In spite of this finding, and in spite of the provision in Section 201(a) of the Act (49 Stat. 847, 16 U. S. C. A. §824(a)) that federal regulation shall "extend only to those matters which are not subject to regulation by the States", the Court below found (erroneously, as petitioners contend) that Jersey Central is a "public utility", as defined in the Act, and that the Federal Power Commission had jurisdiction over the stock acquisition.

At hearings held before the Federal Power Commission counsel for the Commission introduced evidence with respect to all phases of Jersey Central's operations; in particular, an attempt was made to show that Jersey Central owns or operates facilities for transmitting or selling electric energy in interstate commerce by reason of an interconnection maintained by Jersey Central and New Jersey Power at Boonton, New Jersey (R. 216). This interconnection is infrequently used (R. 217; and see Comm. Exh. No. 2, R. 42, 967, 969) and the Commission itself disregarded the testimony concerning this interconnection and based its findings solely on the seven-eighths of a mile of line already

* See further, *infra*, pp. 75-76, and Appendix A, printed separately.

not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

"(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

"(d) The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale.

"(e) The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part."

(e) Physical facilities of Jersey Central and interconnection with Public Service.

Jersey Central owns and operates a generating plant for the production of electficity at South Amboy, on the south side of the Raritan River in New Jersey. (See Intervenor's Exhibit No. 1, R. 272, 1038). The seven-eighths of a mile of transmission line which was the sole basis for the Determination by the Commission that Jersey Central is a "public utility", runs from this South Amboy generating plant to metering equipment at the south bank of the Raritan River, in New Jersey. At that point Jersey Central has a connection with Public Service Electric & Gas Company (hereinafter referred to as "Public Service"), a company not affiliated in any way with Jersey Central or with New Jersey Power (R. 336). Public Service is also a New Jersey corporation engaged in selling electricity and gas at retail, to residents of that state.

At irregular intervals, Jersey Central sells energy to Public Service at this point of interconnection in New Jersey (R. 277, 317-9). At such times as Public Service receives such energy, the latter is conducted in the lines of Public Service under the Raritan River to the Mechanic Street substation of Public Service at Perth Amboy, New Jersey (R. 516). As will shortly appear, the Commission based its determination that *Jersey Central* is a "public utility" entirely upon an investigation of the facilities of *Public Service*, especially the Mechanic Street substation. Consequently, while this facility neither belongs to nor is subject in any way to control by Jersey Central, it was, in the view of the Court below, the crucial factor in determining the status of Jersey Central. Hence it will be described in some detail.

(f) The Mechanic Street substation of Public Service.

A substation is a distribution center in an electric system. Electricity is received in the substation at a facility known as the bus bar. Energy may then flow from the bus bar to other points on the electric system, either with or without intermediate changes in force or voltage. The Mechanic Street substation is one of 54 substations in the "Northern Zone" of Public Service (all 54 substations are in New Jersey), and is one of seven substations in the "Central Division" of that zone (R. 103, Commission Exhibit No. 10, R. 103, 982). From this substation, Public Service has lines running to its Metuchen substation and switching station, and lines to its Carteret and Keasby substations, and thus to lines throughout its territory in New Jersey (R. 518). The substations at Metuchen, Carteret and Keasby are themselves connected to generating plants and substations, so that the Mechanic Street substation is an integral part of the general Public Service transmission

referred to (R. 939). The Commission's unwillingness to rely on the testimony in question is understandable in view of the admission of its witness that he had not traced any energy from Jersey Central to any state outside New Jersey through the interconnection at Boonton (R. 231).

In the same way, much testimony was introduced by counsel for the Commission with respect to an interconnection by Jersey Central with Public Service Electric & Gas Company at Wrightstown, New Jersey. This testimony was also disregarded by the Commission for the same reason, namely, that its witness stated flatly that he had not traced any energy from Jersey Central to another state through the interconnection at Wrightstown (R. 252).

Further testimony which was also disregarded by the Commission related to the operation of Jersey Central in synchronism with not only New Jersey Power and Public Service, but with various companies in Pennsylvania and Maryland. Operation in synchronism means no more than that the generators of each company are spinning at identical speeds and in such a manner that there is a coincident pulsation of the electric voltage or power (R. 537). In spite of elaborate testimony in the record, the Commission did not refer to the matter of synchronized operation in its findings and did not base its order thereon. Here again the Commission's witness admitted he had not traced any energy to Pennsylvania (R. 236, 182-3) and indeed the record shows that not a single kilowatt of energy ever flows over any interconnection merely because of synchronism (R. 537).

In the Court below counsel for the Commission endeavored to show that despite the absence of findings by the Commission these three topics still possess some significance. The Court below made no mention of them whatever except to point out in a footnote (R. 1117-18) that: "Though much

emphasis is laid by some of the Commission's witnesses on the phenomenon of synchronization, it does not possess significance under the facts of the appeals at bar except to the extent indicated in the opinion." The body of the opinion merely refers to the existence of synchronized operation (as it does to the fact that the Wrightstown and Boonton interconnections exist), without more. Hence the considerable part of the record devoted to these subjects may be disregarded in considering the issues before this Court.

(d) Statutory Provisions:

The provisions of the Act pertaining to the definition of the term "public utility" are as follows (49 Stat. 847-8, 16 U. S. C. A. §824):

> "Section 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.
>
> "(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall

and distribution circuits—one of many points on the general service loops of Public Service, whose facilities and operations are much more extensive than those of Jersey Central, or any of the other companies involved in this case (R. 103, 693 ff., Comm. Exh. Nos. 9 and 10, R. 102, 981, 103, 982).

The bus bar of Public Service in the Mechanic Street substation has ten taps. Beginning at one end of the bus bar there is a tap to General Cable Corporation, a large customer of Public Service at Perth Amboy, New Jersey. Next, there is a tap connected to a line which eventually leads to the interconnection with Jersey Central at the south bank of the Raritan River, in New Jersey. Then there is a tap connected to the Public Service circuit leading to its substation at Carteret, New Jersey, and following this is one of the taps connected with the Metuchen substation of Public Service, in New Jersey. The fifth tap leads to a transformer for the local distribution of energy in and around Perth Amboy. In approximately the middle of the bus bar there is an oil circuit breaker, which can be used to isolate the above taps from those which follow. Continuing on the opposite side of the circuit breaker, there is a tap for the second of the two lines to Metuchen, and following that a second line for the local distribution of electricity in Perth Amboy. There follows an airbrake switch in the bus bar, and then a tap for a line from Staten Island Edison Corporation (hereinafter referred to as "Staten Island"), a company engaged in selling electricity at retail in Staten Island, New York. The next succeeding tap is another general circuit of Public Service, this one from its Keasby, New Jersey, substation. The last tap connects with a second line to General Cable Corporation (R. 517-8, Comm. Exh. Nos. 8 and 9, R. 101, 980, 102, 981).

There are thus four places on the bus bar where it is joined with the general circuits of Public Service in New Jersey, over all of which lines energy flows daily to and from the bus bar. In addition, there are four other taps on the bus bar to serve the Perth Amboy local load of Public Service and one of Public Service's large industrial customers. The switches and circuit breakers on the bus bar are normally closed, but the control of these switches and the ability to isolate some of the taps from others is, of course, entirely in the hands of Public Service.

(g) Relation of Jersey Central to Public Service.

Jersey Central and Public Service have entered into a contract whereby one agrees to supply the other in the event of an emergency (R. 275, 1039). However, Public Service has never had occasion to require emergency energy under such contract, and during a period of more than twelve months prior to March 14, 1938 (the date of the stock aequisition in question), Jersey Central took no emergency power from Public Service (R. 288).

Practically all the energy transferred by Jersey Central to Public Service is sold under an informal oral arrangement and is known as "economy flow". This arrangement is not based on any written contract, but is merely the result of an understanding between the operators of Jersey Central and Public Service, due to the fact that while each company has ample capacity to serve all its customers (R. 324, 355), such service may require the use of generators which are at the particular time less efficient than those available to the other company. When this differential in production costs will occur is an unpredictable matter, since it depends on the varying loads put upon each system, and the production costs of each company. However, when the load dispatchers of each company discover that one has energy

available, and that there is a differential in production costs, the company with the more costly production may request the other to furnish the cheaper energy to it at slightly more than cost. Under the economy flow arrangement a request for energy may or may not be complied with, and the flow may be cut off at any time (R. 276, 285, 318).

Jersey Central supplies economy flow energy to Public Service relatively frequently (R. 324) but the money involved is comparatively insignificant. As the Court below pointed out:

> "Public Service receives economy-flow current almost daily from Jersey Central but it should be noted that Jersey Central's net receipts from the sale of economy-flow current for the year 1937 were about $10,000 while its net income from all the electricity sold by it during the same period amounted to $4,170,585. Jersey Central in fact is principally engaged in the retail sale of electricity to numerous individual customers in its territory." (R. 1117)

As stated previously, the Court below found that Jersey Central does not sell any electric energy whatsoever directly in interstate commerce (R. 1128). Furthermore, the record is absolutely clear that Jersey Central has no connections of any kind with Staten Island—no contracts, formal or informal, no arrangements, no "understandings", nothing (R. 285, 292-3, 332, 453-4). The Court below expressly stated: "There were no commercial transactions whatsoever between the Staten Island Company and Jersey Central" (R. 1133).

(h) Relation of Public Service to Staten Island.

Staten Island is likewise not affiliated in any way with Public Service. At the hearings, an officer of Staten Island

testified the company had ample generating capacity of its own in excess of its peak loads (R. 371-2). However, in order to provide for emergency situations, Staten Island has a line connected to a submarine cable which runs under the Arthur Kill, a body of water separating New Jersey from New York (R. 348). At mid-channel, the cable is connected to a line owned by Public Service, which line leads into the Mechanic Street substation of Public Service at Perth Amboy, New Jersey. This line joins the bus bar through one of the ten taps described in detail above. There are circuit breakers, disconnecting switches and meters on both the Staten Island side and at the Mechanic Street substation. Normally these facilities are operated closed at both ends, but here again the control and physical ability to change the arrangements of switches and circuit breakers is entirely outside the hands of Jersey Central (R. 348).

The function of this connection between Staten Island and Public Service was described by Mr. J. H. Lytle, engineer in charge of operations of Staten Island, who testified that the connection—

> "... has been operated primarily to supply Staten Island in case of the breakdown of facilities ... When our facilities are back to normal, we notify them that the emergency period has ended. That is the principal use of the interconnection, the principal reason for it." (R. 349)

Even for emergency purposes, the interconnection has been rarely used. During the entire period from August 26, 1935 (the effective date of the Act), to March 14, 1938 (the date of the stock acquisition in question), there were only ten occasions when the connection was used for emergency service, and on four of the ten occasions the period of time involved was so small that no kilowatt-hours were recorded (R. 349).

Public Service has also, on a few occasions during this period, sold economy flow energy to Staten Island. As shown by the record (R. 355-60, Resp. Exh. No. 3, R. 360, 1071), the quantity of energy involved in these economy flow transactions between Staten Island and Public Service has been quite insignificant (R. 525). All the economy flow energy taken by Staten Island from Public Service during the period from August 26, 1935 to March 14, 1938, would be about enough to run a 25-horsepower motor during the same period (R. 525). No economy flow whatever was taken for long periods, *e. g.*, from April 30, 1937, to the date of the stock acquisition in question, March 14, 1938 (Resp. Exh. No. 3, R. 360, 1071, 1073).

Apart from the infrequent occasions when emergency or economy flow energy passed between Public Service and Staten Island, the two companies attempted to prevent *any* energy from flowing across the interconnection. Instead of accomplishing this by opening the switch, however, the companies maintained the line connected but "in balance" (R. 361-2, 411). If the switch were kept open, and an emergency arose, it might take some time to close the connection and secure the emergency supply of energy (R. 362). Even a relatively short delay would be serious (R. 408). The load dispatcher of the company requiring the emergency energy would have to communicate with the load dispatcher of the other company, and the latter would then be required to make arrangements to close the switch and make all the other arrangements necessary to connect the systems and increase the amount of energy being generated. The delay involved in making these arrangements was avoided by maintaining the interconnection closed, and at the same time energy was prevented from flowing from one company to the other by maintaining the line "in balance", that is, the respective system generating stations were

operated so as to satisfy each system's load requirements without the use of the interconnection. This was accomplished by regulating the amount of steam admitted to the turbo-generators connected to the interconnection, in relation to the load put upon each system (R. 361-3, 409-11).

The testimony in this case shows in detail the constant efforts to maintain the line in balance, as described above. Staten Island has a watt-hour meter attached exclusively to the line connecting it with Public Service, so that the Staten Island operators know immediately if the balance has been disturbed (R. 361) and are enabled to take steps to restore it (R. 362). The line may be thrown out of balance by the fact that when a sudden demand is made for more energy on one system, there is a slight time lag before the generators on the system automatically pick up this load. There is a tendency on the part of the system on which the demand has been made to draw on the other system during the brief fraction of time between the demand and the compensating generator speed-up. During this interval, some energy may "slop over" from one system to the other. (R. 245-6, 413) The process of keeping the line in balance was described by Mr. J. H. Lytle, chief of operations of Staten Island as follows, in answer to questions asked by counsel for the Commission:

> "A. I will answer that by telling you what they do. The man who has charge of the System operation has a watt meter before him.
>
> "Q. Let us place that man. Where is he? A. He is at the St. George Substation. He controls the System. He has a watt meter connected to the interconnection. It doesn't measure anything else. It is on separate wires. That is before him all the time. It reads two ways, power flowing out from Staten Island Edison or flowing into Staten Island Edison. When he sees that move either way he immediately

calls the power house, the switchboard attendant at the power house at Livingston on a private line, a line that is connected at all times, and tells him to pick up so much load or drop so much load.

"They generally do it on account of the size of the meter in blocks of 500. Actually he doesn't call up. They have worked out a system of rings, two rings to drop 500, like that, they don't even have to telephone. I never have timed it. The instructions are followed promptly and it will take the time it takes for the men to do it. It is not complicated.

"Q. What happens at the generating plant when they get the instructions? A. The man himself who gets the signal can adjust the governor on the turbine.

"Q. How long does that take? A. A few seconds.

"Q. What does the generator do? A. Either takes on more load or drops more load.

"Q. Does the generator operate instantaneously? A. Nothing mechanical operates instantaneously. It operates in a couple of seconds. The governing mechanism is driven by an electric motor. It would take a few seconds.

"Q. The reason you go through these various steps is to try to balance the load on your System with what you are generating, isn't that correct? A. The reason is to reduce to a practical minimum what is slopped over." (R. 410-411)

As the line moves in and out of balance, surges or swings of energy "slop over" the closed connection from one company to another. For the most part, these swings of "slop-over" energy, as it is known in the industry, are pulsations of momentary duration (R. 286, 361-3, 520-1). Slop-over energy is regarded as a nuisance in the operation of an electric system, since the swings of energy dart rapidly from one system to another, are uncontrollable, unwanted and unreliable.

By its very nature, slopover energy is, of course, entirely without commercial significance (R. 362-3, 400, 465). The nuisance of slopover energy is regarded as an incident to the maintenance of a ready interconnection for emergencies (R. 362, 407).

The constant effort to keep the line in balance is shown by the fact that in a given period of time, almost exactly the same quantity of energy was recorded as slopping over from Public Service to Staten Island as from Staten Island to Public Service (Res. Exh. No. 5, R. 366, 1075). For the difference over a period of one year, Public Service paid $115.56, the bare cost of production to Staten Island (*id.*, R. 367).

It need hardly be pointed out that *Jersey Central* has no control over the pulsations of slop-over energy (or any other energy) from Public Service to Staten Island or vice versa. In fact, if Jersey Central did not exist, slop-over would nevertheless occur from time to time between Staten Island and Public Service, as long as the connection between the two companies was kept closed; indeed, the Staten Island-Public Service interconnection was established in 1925 (R. 367), six years before the South Amboy plant of Jersey Central was even constructed (R. 273). Finally, the record shows that it is not possible for Jersey Central to route or direct *any* electricity into Staten Island, even if it should want to, since control of the flow from Mechanic Street substation rests entirely in Public Service (R. 516).

(i) Analysis by Federal Power Commission Staff of Mechanic Street substation operations.

For purposes of the present proceeding, the Federal Power Commission through its staff conducted a detailed investigation of the facilities and operations of the Central Division of Public Service, particularly the Mechanic Street

substation. The very examination made by the Commission to reach its conclusion that Jersey Central owns facilities "utilized for" transmission of energy in interstate commerce illustrates strikingly the fact that if any energy generated by Jersey Central found its way to Staten Island, this occurrence was unknown and unintended by Jersey Central, was beyond the control of Jersey Central, and did not constitute commerce or interstate commerce.

Public Service's operators at Mechanic Street substation take "log" readings at forty-two stated times of the day, to record the flow of energy, at the moment of the reading, in and out of the substation through the ten connections or taps on the bus bar. The Commission examined the log readings during the period from January 26, 1937 to September 6, 1938, or a total of approximately 25,500 such readings (R. 266). (The period of time selected was entirely the choice of the Commission.) From these 25,500 readings, the Commission selected 184,* or seven-tenths of 1%, not at random but deliberately and admittedly (R. 266) with the view of proving that some energy generated by Jersey Central reached Staten Island via Public Service. The basis for the selection of these 184 instances is important and was described in the words of the Commission's own witness as follows:

> "Q. . . . Then you have taken some 150 readings out of approximately 25,000 readings. Just why did you take these particular 150, Mr. Grimsley? A. At times when considerable power was going over from Jersey Central and for the same period it was going to Staten Island. *That was necessary to make my determination.* Now we might get 15,000, I don't know, to compare with those, *but the point was to*

* The Commission's witness Grimsley spoke of 150 instances, but actual count discloses 184 (Comm. Exh. No. 11, R. 108, 983).

establish certain conditions at time of flow and at times when there was no energy flowing to Staten Island there was no point in taking those readings.

"Q. These are hand-picked readings where you worked toward a particular result and you selected those that would best show what you desired to establish? A. *I was trying to get a condition when the energy was coming over from Jersey Central and flowing to Staten Island and over a period that might be considered typical.*

"Q. Just a moment—— A. (interposing) I don't know unless we go through all of them and compare them with these.

"Q. I suppose it would be pretty easy to pick out 150 other examples when power is flowing from Metuchen substation to Staten Island supplying the Mechanic Street load, would it not? A. Oh, I think so, yes. Maybe more" (R. 266).

In view of this description of how the 184 instances were selected, it is difficult to find any basis for the implication by the Court below (R. 1119) that the selections were "representative". Although the Commission's witness conceded that, so far as he knew, there were many instances among the 25,500 when no energy was flowing from Jersey Central to Public Service, or from Public Service to Staten Island, all of such latter log readings were disregarded.

After selecting the 184 instances suitable to them, the Commission's engineers made a detailed analysis of the energy supplied to and the demand made upon not only the Mechanic Street substation, but all seven substations of the Central Division of Public Service at each of the 184 points of time (Comm. Exh. No. 13, R. 144, 1002). The Commission's engineers also made studies of the power factors at each of the seven substations at the time of "ordinary heavy load condition" (R. 116), and studied the line im-

pedances throughout the Central Division of Public Service (R. 117). All of these substations are, of course, the property of Public Service, and Jersey Central has neither access to nor control over their operation. When these data were assembled and analyzed, the Commission reached the conclusion (set forth in Comm. Exh. No. 16A, R. 764, 1004) that in 24 of the 184 instances (selected in turn from the 25,500), there were *moments of time* when all the energy flowing into Mechanic Street came from Jersey Central, and that since, at the same moments, some energy flowed from Mechanic Street to Staten Island, such energy must have come from Jersey Central. The evidence of the Commission does not disclose the *duration* of the flow or the *quantity* of energy supposedly transferred from Jersey Central to Staten Island. The Court below said:

> "*How much* of the electricity which flowed from Public Service to the Staten Island Company originated in Jersey Central's South Amboy generators and passed over the connecting line from South Amboy to the Mechanic Street Substation and thence through the bus-bar to the Staten Island Company *no one can say.* It is certain that some did go to the Staten Island Company. *Measured in terms of the KWH generated and transmitted by large electric public utility systems it was small*" (R. 1121).

Moreover, the record is clear that in every instance among the 24 which occurred during the period from August 26, 1935 (the effective date of the Federal Power Act) to March 14, 1938 (the date of the stock acquisition in question), energy generated by Jersey Central could have escaped to Staten Island from Public Service's lines only as slop-over energy, while the two companies were attempting to keep their interconnection in balance and thus prevent *any* flow. (Compare Comm. Exh. No. 16A, R. 764, 1004, with

Resp. Exh. Nos. 2 and 3, R. 353, 1070 and 360, 1071). On this evidence,* the Commission made its finding that Jersey Central owns facilities "utilized for" the transmission of energy in interstate commerce (R. 939), and held Jersey Central subject to its jurisdiction under the Federal Power Act. This conclusion was affirmed by the Court below.

Specification of Errors Intended to be Urged.

Petitioners Jersey Central and New Jersey Power specify as errors the adverse holdings of the Court below with reference to the questions presented as Nos. 1, 3, and 4 of the petition for writ of certiorari of petitioner Jersey Central (see Jersey Central petition, pp. 8-9), and questions I, I-a, I-b, I-c, III, and IV of the petition for writ of certiorari of petitioner New Jersey Power (see New Jersey Power petition, pp. 11-13), such errors being more particularly the following:

1. The Court below erred in holding that petitioner Jersey Central is a "public utility" as defined in Section

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* At the hearings in this matter the Commission introduced evidence in an attempt to show that interstate transmission of energy took place from Staten Island to Jersey Central. Comm. Exh. No. 18 (R. 130, 1009), covering a total of 17 log readings, was first introduced. Upon objection by petitioners that all the times selected were subsequent to March 14, 1938, the date of the stock acquisition in question, Comm. Exh. No. 18A (R. 758, 1010) was offered, covering 27 log readings during the period January 1, 1937 to March 14, 1938. Commission witness Grimsley stated (R. 132) that if Jersey Central is receiving from Public Service an amount of energy in excess of the total energy coming into Mechanic Street from Metuchen, then necessarily a *part* of the energy moving from Public Service to Jersey Central must come from Staten Island. That condition occurred exactly once (subsequent to March 14, 1938) in all the log readings included on both exhibits. The Court below gave no effect whatever to this phase of the Commission's case.

201 of the Federal Power Act (49 Stat. 847, 16 U. S. C. A. §824).

2. The Court below erred in holding that petitioner Jersey Central, whose business is wholly intrastate and which neither sells nor transmits electricity directly in interstate commerce, became a "public utility" within the meaning of the Act in transmitting electric energy wholly within the State of New Jersey to Public Service, if Public Service had a connection, in the same state, with Staten Island over which it (Public Service), independently of petitioner Jersey Central, sold and transmitted electric energy in interstate commerce, and if scientific studies of electrical phenomena indicated that on relatively few occasions, under peculiar operating conditions and wholly beyond the control of petitioner Jersey Central, small quantities of electric energy generated by petitioner Jersey Central were found in the system of Staten Island in an adjoining state.

3. The Court below erred in holding that a company, otherwise engaged wholly in intrastate commerce, engages in interstate commerce by reason of the acts or omissions of other, non-affiliated persons, not its agents, over whom no control is exercised, and whose activities are conducted without its knowledge.

4. The Court below erred in holding that the transmission of electric energy over facilities located wholly within a single state constitutes transmission *in* interstate commerce without proof of a continuous movement of energy from one state to another, and without proof of any intention, express or implied, that the movement of energy should be interstate.

5. The Court below erred in holding that the transfer of energy by Jersey Central to Public Service constitutes

transmission *in* interstate commerce despite the delivery in the State of New Jersey of all such energy to the general network of Public Service, and the commingling of such energy with energy admittedly generated by Public Service.

6. The Court below erred in holding that an electric company wholly subject to regulation by a state was not excluded from federal regulation by the terms of Section 201(a) and (b) of the Act (49 Stat. 847, 16 U. S. C. A. §§824(a) and (b)).

7. The Court below erred in failing to hold that Section 201(a) of the Act (49 Stat. 847, 16 U. S. C. A. §824(a)) restricts or limits the scope of the definition of interstate commerce in Section 201(c) of the Act (*idem*), and in failing to hold that the said section limits the scope of the definition of "public utility" in Section 201(e) of the Act (*idem*) and the consequent jurisdiction of the Commission with respect thereto.

8. The Court below erred in holding that despite the provisions of Section 201(a) of the Act (49 Stat. 847, 16 U. S. C. A. §824(a)), and its legislative history, the Commission could exercise jurisdiction over petitioner Jersey Central with respect to a "matter" which the Court below found was subject to regulation by the State of New Jersey, and which the appropriate regulatory body of the State of New Jersey had approved.

9. The Court below erred in holding that despite the provisions of Section 201(a) of the Act (49 Stat. 847, 16 U. S. C. A. §824(a)), and its legislative history, the Commission could exercise jurisdiction over petitioner New Jersey Power with respect to a "matter" which the Court below found was subject to regulation by the State of New Jersey, and which the appropriate regulatory body of the State of New Jersey had approved.

Summary of Argument.

The issue in this case is solely one of statutory construction, and involves the meaning of the Federal Power Act in so far as that statute delegates regulatory jurisdiction to and withholds it from the Federal Power Commission. The only question is what Congress did—not what it could have done.

Petitioners contend:

I. That petitioner Jersey Central is not a "public utility" as defined in the Act, and that therefore petitioner New Jersey Power could acquire the stock of Jersey Central without the approval of the Federal Power Commission.

This proposition is supported by the following:

A. The internal evidence in the Act. An analysis of the provisions of the statute demonstrates that the Act is clear in its indication of Congressional intent to forego regulation of a company such as Jersey Central.

B. The external evidence provided by a comparison of the Act with other statutes enacted with a view toward federal regulation of an activity or a business, when Congress intended to exercise fully its broad powers under the Commerce Clause of the Constitution. This comparison leads to the conclusion that Congress intended to regulate electric transmission only when such transmission occurred directly *in* interstate commerce.

C. The legislative history of the Act when it was before Congress. This involves an examination of the debates, statements of committee chairmen, the record of committee hearings, and the reports of the appropriate congressional committees, supplemented by consideration of the additions and deletions to the bill in the Senate and House, after the hearings.

D. The meaning in the Act of the phrases "in interstate commerce" and "in intrastate commerce" as developed by this Court. The premise of this analysis is that Congress legislated within a pattern which can be clarified by showing the judicial construction of the phrases used in the statute. The argument does not challenge the constitutional powers of Congress under the Commerce Clause. It involves a discussion of state tax cases, through or local rate cases, and other types of cases; in which transportation is by steps or phases. It concludes that intention of and control by the shipper or transmitter as to the point of destination determines the interstate or intrastate character of the commerce.

II. That Congress excluded Jersey Central from the operation of the statute by the enactment of Section 201(a) of the Act.

This proposition is supported by the following:

A. Section 201(a) of the Act excludes from the jurisdiction of the Commission persons all of whose facilities and operations are subject to regulation by a state.

B. The facilities and operations of petitioner Jersey Central are subject to regulation by the State of New Jersey.

C. Section 201(a) of the Act is the declaration of Congressional policy, defines the scope of the Act, and must be read with every other section of the Act.

III. That approval by the New Jersey Board of Public Utility Commissioners of the acquisition by New Jersey Power of the stock of Jersey Central excludes jurisdiction over such transaction by the Federal Power Commission.

This proposition is supported by the following:

A. Section 201(a) of the Act excludes from the jurisdiction of the Commission transactions which are subject to regulation by a state.

B. The acquisition by New Jersey Power of the stock of Jersey Central was subject to regulation by the State of New Jersey and was in fact approved by the New Jersey Board of Public Utility Commissioners.

IV. The judgments of the Circuit Court of Appeals should be reversed for cumulative or alternative reasons.

A. Petitioner Jersey Central is not a "public utility" as defined in the Act; and the stock acquisition was subject to effective State regulation. For both these reasons, the Federal Power Commission was without power to enter its order.

B. Petitioner Jersey Central is not a "public utility" as defined in the Act. If the Court so determines, there is no need to pass upon the jurisdiction of the Federal Power Commission over the stock acquisition.

C. The stock acquisition, being subject to effective State regulation, is not subject to the jurisdiction of the Federal Power Commission. If the Court so determines, there is no need to determine the status of petitioner Jersey Central.

POINT I.

Jersey Central is not a "public utility" as defined in the Federal Power Act.

(a) Scope of the Federal Power Act.

The Federal Power Act and the Public Utility Holding Company Act of 1935 together constitute the "Public Utility Act of 1935". This statute had for its objective the imposition of federal regulation over certain phases of the gas and electric industry. The provisions and purposes of the Federal Power Act, however, differ markedly from those of the Public Utility Holding Company Act of 1935, in spite of the fact that they were adopted as parts of a single statute. In the case of *holding* companies, not themselves directly engaged in the utility business, but owning securities of subsidiary operating companies located in many states, the general view was that regulation by the states could not effectively reach such companies, and required implementation by comprehensive federal action.* Consequently, Congress conferred broad powers on the Securities and Exchange Commission to "meet the problems and eliminate the evils . . . connected with public utility holding companies which are engaged in interstate commerce *or in activities which directly affect or burden* interstate commerce" (49 Stat. 803, §1(c), 15 U. S. C. A. §79(a).) It is to be noted that one of the chief purposes of the Public Utility Holding Company Act of 1935 was the *contraction* of large holding company systems, controlling facilities in many widely separated states. In their place the statute

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* The arguments made, and the literature with respect to this controversy are collected and analyzed in *Federal Regulation of Holding Companies: The Public Utility Act of 1935*, 45 Yale L. J. 468, 481, Footnote 56.

contemplated the emergence of smaller, geographically integrated systems, following state lines where economically feasible, *in order to secure the advantages of localized management and effective regulation by the states.* (Public Utility Holding Company Act of 1935, Sections 2(a)(29)(A) and 11(b)(1), 49 Stat. 810, 820, 15 U. S. C. A. §§79b and 79k.)

In the case of *operating* utility companies principally supplying electricity at retail, a different type of regulation was imposed. The business of these operating companies is generally confined to one state or at most a few states. Furthermore, at the time of the passage of the Federal Power Act regulatory bodies with varying powers were already in existence in 47 states. (Hearings, House of Representatives, Committee on Interstate and Foreign Commerce, H. R. 5423, 74th Cong., 1st Sess., 496-7; these Hearings will hereafter be referred to as "House Hearings"). The bill which became the Federal Power Act was prepared under the direction of the Federal Power Commission (House Hearings, p. 400). Representatives of that Commission, who participated in this task, recognized unequivocally that the advantages of regulation by local authorities were considerable, and should be preserved and complemented to the extent made necessary by *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927) (*Id.*, pp. 497-8). Commissioner Seavey, a member of the Federal Power Commission, thus testified before the House Committee on Interstate and Foreign Commerce:

> "There is incorporated in the act a clear pronouncement of the congressional policy which was adopted when the Communications Act was passed, and that is that matters largely of a local nature, even though interstate in character, should be handled locally and should receive the consideration of local

men familiar with the local conditions in the community involved". (House Hearings, p. 393)

Mr. Dozier DeVane, Solicitor to the Federal Power Commission and one of the draftsmen of the original bill (House Hearings, p. 553), testified as follows:

> "There has been considerable discussion here as to what is the purpose of this legislation and the effect it will have upon States and upon State regulation, and in that connection, I wish to say that in the instruction to its representatives that participated in the preparation of this legislation, the Federal Power Commission directed that what it desired to recommend to Congress was legislation that would complement and not supersede State regulation.
>
> "*Our specific instructions, from our Commission, was* [sic] *to preserve to the fullest extent State regulation and to draw a law that would complement that regulation as far as Congress could go.*" (House Hearings, p. 495)

The provisions of the Federal Power Act defining a "public utility" are found in Section 201, printed at pages 9 and 10, *supra*. They evidence plainly the background referred to above:

> (i) Subsection (e) of Section 201 defines a "public utility" to be a person who owns or operates facilities subject to the jurisdiction of the Commission.
>
> (ii) Subsection (b) of Section 201 provides that the Commission shall have jurisdiction over facilities for the transmission of electric energy in interstate commerce or for the sale of electric energy at wholesale in interstate commerce. *The same subsection specifically provides that*, with certain exceptions which are not material, *the Commission shall not have jurisdiction over facilities used for the genera-*

tion of electric energy or over facilities used in local distribution or *only for the transmission of electric energy in intrastate commerce,* or over facilities for the transmission of electric energy consumed wholly by the transmitter. Furthermore, subsection (a) of Section 201 declares that federal regulation (through the Federal Power Commission) of the "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" is necessary in the public interest, except that such regulation shall "extend *only* to those matters which are *not subject to regulation by the States*".

(iii) Subsection (c) states that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof."

(iv) Subsection (d) defines the term "sale of electric energy at wholesale" to mean a sale of electric energy to any person for resale.

Subject to the limitations contained in Section 201, the Commission is given jurisdiction, among other things, over rates (Sections 205 and 206), adequacy of service (Section 207), valuation of property (Section 208), sales of facilities, mergers and acquisition of securities of other public utilities (Section 203). Section 204 gives the Commission jurisdiction to pass upon the issuance of securities, and Section 301 gives the Commission jurisdiction over accounting matters. The Act contains provisions for determinations of cost, for investigations, for hearings, for the making of orders and for judicial review thereof.

In addition, the Act makes elaborate provision for cooperation by the Federal Power Commission with the various state bodies. A state may request the Federal Power Commission to compel a connection for the sale of electric

energy in interstate commerce by a private utility (Section 202). On request of a state, the Commission may investigate the cost of production and transmission of electricity, even where the Commission has no jurisdiction over the sale of such energy (Section 206(b)). Provision is made for hearings before joint boards composed of members of a state commission or commissions and the Federal Power Commission, and the latter is even empowered to lend its employees to the state commissions (Section 209).

(b) Nature of Issue Presented.

This examination of the provisions of the Federal Power Act discloses that: (1) Congress did not attempt to confer upon the Commission the broadest jurisdiction possible under Article I, Section 8, Clause 3 of the Constitution; (2) only persons owning or operating facilities for the transmission of electric energy, or sale at wholesale of electric energy, *in* (and not merely affecting) interstate commerce are "public utilities"; and (3) the Commission's power to regulate extends only to such matters as are not subject to regulation by the states, so that

(a) where all the facilities and operations of an electric company are subject to regulation by the states, the Federal Power Commission has no jurisdiction, i.e., no power to regulate, such facilities, and the company is not a "public utility"; and

(b) where a company is a "public utility", by reason of the character of its facilities and operations, a particular transaction consummated by such company is excluded from the jurisdiction of the Commission if such transaction is subject to state regulation.

It is petitioners' contention under Points I and II that under the specific terms of the Act, Jersey Central is not a "public utility", as defined therein, since Jersey Central

does not own or operate facilities for the transmission of electric energy, or sale of electric energy at wholesale, in interstate commerce, and all the facilities of Jersey Central, and their operation, are subject to regulation by the State of New Jersey. Point III supports the proposition that the Commission had no jurisdiction to pass upon the acquisition of stock of Jersey Central by New Jersey Power, in view of the approval of such transaction by the New Jersey Board of Public Utility Commissioners.

Neither the Commission nor the Court below found that Jersey Central owns or operates any facilities for the *sale* of electric energy at wholesale in interstate commerce. The Court below specifically said:

> "It is, of course, beyond dispute that Jersey Central itself sells no electricity directly in interstate commerce * * * the jurisdiction of the Commission must rest upon Jersey Central's ownership and operation of facilities for *transmission* of electricity * * *" (R. 1128).

The record amply supports this view, the soundness of which was conceded by the Commission in the Court below. The only issue before this Court, so far as this point of petitioners' case is concerned, is whether Jersey Central owns or operates facilities for transmitting electricity in interstate commerce.

(c) Jersey Central neither owns nor operates facilities for transmission in interstate commerce.

The Act limits federal regulation to facilities for transmission *in* interstate commerce. It does not attempt to regulate all activities which may possibly be "intertwined with" or "affect" interstate commerce. The Act thus confers a distinctly narrow jurisdiction. In *Federal Trade*

Commission vs. *Bunte Bros., Inc.*, 312 U. S. 349 (1941), this Court, in referring to this very distinction, said:

> "The construction of §5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. Such control bears no resemblance to the strictly confined authority growing out of railroad rate discrimination. An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress. The problem now before us is very different from that which was recently presented by *United States* vs. *Darby, ante*, p. 100. We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act. *This case represents the narrow question of what Congress did, not what it could do.* And we merely hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce', requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished" (pp. 354-5).

Likewise, in the present case, it is important to determine precisely what powers Congress undertook to exercise, and not what Congress might have done under the "full scope" of the Commerce Clause. It is particularly important that the Act shall not be construed so as to constitute an "inroad upon local conditions", in view of the *express* denial by Congress in Section 201(a) of any intention to interfere with local matters.

The necessity for determining exactly the extent and type of control sought to be exercised by Congress was

again adverted to by this Court in *Kirschbaum* vs. *Walling*, 316 U. S. 517 (1942), where the Court said:

> "We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local. • • • The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation". (pp. 521-2)

In the present case, the Court below found, as petitioners conceded, that some energy generated by Jersey Central and sold to Public Service escaped from the facilities of Public Service to Staten Island (R. 1133). The Court held that this constituted the operation by Jersey Central of facilities "in fact employed for" transmission

in interstate commerce within the meaning of subsection (c) of Section 201, "if the words of the subsection be applied literally" (R. 1133). Accordingly, it was held that Jersey Central is a "public utility".

Petitioners urge that this reasoning misconstrues subsection (c), and that Jersey Central owns no facilities for transmitting electric energy in interstate commerce, under a "literal" or any other construction of subsection (c).

The Act states that a company is a "public utility" only if it owns or operates facilities *for the transmission* of electric energy in interstate commerce or *for the sale* of electric energy at wholesale in interstate commerce. The Court below justifiably held that "the jurisdiction of the Commission, if any, must rest upon Jersey Central's ownership and operation of facilities for *transmission* of electricity" (R. 1128). It is implicit in this criterion, as laid down by Congress, that it is the *purpose for which* the facilities are owned or operated which is determinative of their status. A person owning or operating facilities for the transmission of electric energy must own the facilities which transmit—send across—the energy, and this connotes voluntary, intentional action. The Congressional expression is closely akin to the tests frequently stated by this Court for determining whether a given transaction is interstate, namely, whether its "essential character" is interstate (*Pennsylvania Railroad Co.* v. *Clarke Bros. Coal Mining Co.*, 238 U. S. 456, 468 (1915)), or whether the "normal contemplated and followed course" is interstate (*Western Union Telegraph Co.* vs. *Foster*, 247 U. S. 105, 113 (1918)).

The facts in the present case refute any possibility of a finding that the seven-eighths of a mile of line from the South Amboy plant of Jersey Central in New Jersey was designed for or intended for or utilized for transmission in

interstate commerce, or that its "essential character" is interstate. The record is uncontradicted that the function of this line was to provide an emergency source of power (R. 349), such as every well operated electric system possesses, and to permit the disposition of "economy flow" energy to Public Service in New Jersey. The chief operating officer of Jersey Central testified without contradiction that when Jersey Central delivers energy to Public Service, the former has no knowledge what Public Service does with the energy and that there are no arrangements of any kind, formal or informal, to deliver such energy to anyone other than Public Service (R. 285, 293). The operating head of Staten Island, which had been interconnected with Public Service for years before the South Amboy plant of Jersey Central was even constructed, testified as to the complete lack of any arrangement or understanding between Staten Island and Jersey Central, and in fact, stated that Staten Island's transactions with Public Service were not in any way related to Jersey Central; that "All our negotiations, all our agreements, all our talks with them . . . led us to believe that it was power generated by Public Service Electric and Gas Company" (R. 363). The Court below stated flatly: "*There were no commercial transactions whatsoever between Staten Island Company and Jersey Central*" (R. 1133).

In addition to this uncontradicted testimony of the persons actually operating Staten Island and Jersey Central, a consideration of the arrangement of the physical facilities themselves indicates that the function of the seven-eighths of a mile of line owned by Jersey Central is not for the transmission of electric energy in interstate commerce. In the first place there are no less than ten connections on the Public Service bus bar at Mechanic Street. In addition to the tap connecting with Jersey Central, eight of the remaining

connections are to points in New Jersey, and of these, four are to other Public Service substations in New Jersey, which are used constantly to supply customers of Public Service located in New Jersey. Only one of the ten connections leads to a second state, and that connection, as we have indicated elaborately in the statement of facts (*supra*, pp. 16-19), is a seldom used emergency connection, and is maintained almost continuously "in balance", with every effort being made to prevent any energy whatsoever from flowing across the connection. It is clear, therefore, that the "essential character" and purpose of the Jersey Central connection with Public Service is intrastate (Section 201(b)), and the connection is not for transmission "from a state" (Section 201(c)).

Far from showing any intentional "sending across" of energy from New Jersey, the present record makes it plain that if energy generated in New Jersey by Jersey Central reached New York State, it did so unknown to Jersey Central, and by means of and over facilities not in any way subject to control by Jersey Central. In addition, Jersey Central and Public Service are not in any way affiliated, and there is no question of any agency relationship. The facts in this record make is clear, therefore, that Jersey Central owns no facilities whose function is interstate in character, and, in addition, engages in no activity which can properly be described as transmission "from a State".

(d) The intent of Congress to exclude a company such as Jersey Central from the jurisdiction of the Federal Power Commission is revealed by a comparison of the jurisdictional provisions of the Act with analogous provisions of other Federal statutes.

The construction of the Act which we urge confers a narrow jurisdiction on the Commission. This, however, was a matter entirely for Congress to determine. Where

Congress has chosen to enact legislation embodying an exercise of the full scope of the Commerce Clause, it has used appropriate and explicit language to that effect. We have already referred to the jurisdictional provisions in the Public Utility Holding Company Act of 1935 (*supra*, p. 29). That Act and the Federal Power Act were separate titles of a single statute. The following statutes illustrate the "empiric process of congressional legislation under the Commerce Clause", and the "degree of accommodation" made by Congress according to the subject matter of the legislation, its history and the procedures established for its administration. (*Kirschbaum* v. *Walling*, 316 U. S. 517, 520 (1942).)

Thus, where Congress has determined to legislate broadly, with respect to all persons or activities in the stream of interstate commerce, it has used language such as the following:

> ". . . a transaction in respect to any article shall be considered to be in interstate commerce if such article is part of that *current of commerce* usual in the commodity trade whereby commodity and commodity products and by-products thereof are sent from one State with the *expectation* that they will end their transit, after purchase, in another . . ." (Commodity Exchange Act, 42 Stat. 998, 7 U. S. C. A. §3.)

For almost identical language evidencing the intention of Congress to exercise its powers under the Commerce Clause on a broad, all-inclusive scale, see the *Tobacco Inspection Act*, 49 Stat. 731, 7 U. S. C. A. §511(i); *Federal Seed Act*, 53 Stat. 1275, 7 U. S. C. A. §1561(a)(3)(4); *Perishable Agricultural Commodities Act*, 50 Stat. 725, 7 U. S. C. A. §499a(8); *Packers and Stockyards Act*, 42 Stat. 159, 7 U. S. C. A. §183; *Agricultural Adjustment Act*, 50 Stat. 248, 7 U. S. C. A. §610(j).

Where it is the desire of Congress to legislate with respect to persons or activities "affecting" or "burdening" interstate commerce, appropriate language has likewise been found for this purpose. Thus, the *Railway Labor Act* (53 Stat. 1404, 45 U. S. C. A. 51) covers any employee of a carrier, any part of whose duties as employee is in "furtherance" of interstate commerce, or whose employment shall "in any way directly or closely and substantially affect such [interstate] commerce." Similarly, the *Fair Labor Standards Act* (52 Stat. 1060, 29 U. S. C. A. §202), undertakes to eliminate conditions which "burden commerce and the free flow of goods in commerce"; and the *Agricultural Adjustment Act* (50 Stat. 246, 7 U. S. C. A. §608b) empowers the Secretary of Agriculture to enter into marketing agreements with persons engaged in handling any commodity "in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects", interstate commerce. The *Bituminous Coal Act* (50 Stat. 83, 15 U. S. C. A. §834), asserts jurisdiction over *intrastate* commerce which "in any manner directly affects interstate commerce in coal."

The above statutes make it plain that the jurisdiction conferred by Congress upon the Federal Power Commission was extremely narrow in extent, limited to transactions *in* interstate commerce. In fact, the present version of subsection (c) of Section 201 was intended as a *limitation* on transmission *in* interstate commerce, since it excludes transmission between points within the same state but through a second state. The original bill (S. 1725, 74th Cong. 1st Sess.) included both. This limitation has been recognized by the Commission itself, in *Matter of Chicago District Electric Generating Co.*, F. P. C. Opinion No. 63, July 16, 1941. Since we are concerned only with what Congress did and not what Congress might have done, the

conclusion is clear that in the case at bar Jersey Central energy was transmitted "only . . . intrastate" (Section 201(b)) and was not "transmitted from a State", within the meaning of subsection (c) of Section 201, and that Jersey Central is, therefore, not a public utility.

(e) The legislative history of the Federal Power Act.

It is petitioners' contention that the definition of "public utility" contained in the Act does not include such a company as Jersey Central, and that, on the contrary, under the express terms of the Act it is excluded from this category. Beyond this, the legislative history of the Act removes any possible doubt that this conclusion is correct.

Petitioners have referred (*supra*, p. 30) to the statement by Commissioner Seavey, of the Federal Power Commission, that the original bill (drafted largely by the staff of the Federal Power Commission), contained a "clear pronouncement of congressional policy" that matters largely of a local nature, even though interstate in character, should be handled locally. To the suggestion that the Act include by its provisions some such doctrine as that enunciated in the *Shreveport* case (*Houston & E. W. Texas R. Co.* v. *United States*, 234 U. S. 342 (1914)), Commissioner Seavey made the following reply before the House Committee on Interstate and Foreign Commerce:

> "I have already discussed the Shreveport matter, under questions, but I would like to say further that one of the reasons, and the principal reason to my mind, that there is no need of a Shreveport provision in this bill as there is in the Interstate Commerce Act, is that the nature of the utility service is entirely different. Your electric utility has been constructed in a different way. It started with a purely local service. *It is still, to all intents and purposes, outside of those interstate contacts, pri-*

> *marily a local service* and the property of these utilities can be very clearly separated into the component parts of the different operations. That is, you can separate the transmission; you can separate the production; you can separate the distributing systems very clearly. So that that being possible, the application of rates so that a reasonable return may be received upon any part of that property is possible in the electric industry. In the railroads it is not." (House Hearings, p. 399.)

Petitioners do not desire to recount here the many arguments and considerations involved in the question of federal, as compared with state, regulation of the utility business. It is enough to point out that preceding the enactment by Congress in 1935 of the Federal Power Act there had been the fullest and most extensive discussion of the subject in the literature, in the industry, and in Congress itself. See *Ellsbree, Interstate Transmission of Electric Power* (1931), pp. 161-197, and see the list of earlier Congressional efforts on the subject in House Hearings, pp. 492-4.

The conclusion reached by Congress after considering elaborate testimony presented to both the Senate and the House Committees was that the regulatory powers then exercised by the states should be preserved and indeed strengthened; that the only need for federal regulation was that disclosed by *Public Utilities Commission* vs. *Attleboro Steam and Electric Company*, 273 U. S. 83 (1927), where it was held that a state could not regulate the rate charged for electric energy sold and transmitted directly across a state line, concededly in interstate commerce. While a state could, of course, regulate the retail distribution of electricity generated and sold in the same state, and indeed could regulate the retail sale of energy after it was received in the second state (*Pennsylvania Gas Company*

vs. *Public Service Commission*, 252 U. S. 23 (1920); *Mill Creek Coal & Coke Co.* v. *Public Service Commission*, 84 W. Va. 662 (1919); and see *South Carolina Power Company* vs. *Commission*, 52 Fed. (2d) 515 (1931), aff'd 286 U. S. 525 (1932), the *Attleboro* case left a "gap" in utility regulation, which the states could not, and, before the Act, the Federal Government did not, regulate.

That the purpose of the Act was to close this "gap", and complement rather than supersede regulation by the states, is disclosed over and over again in the legislative history of the statute. Thus, Commissioner Seavey, of the Federal Power Commission, presented the following analysis to the House Committee, which was considering the original, much broader, draft of the Act:

> "The new title II of the act is designed to secure coordination on a regional scale of the Nation's power resources and to fill the gap in the present State regulation of electric utilities. It is conceived entirely as a supplement to, and not a substitute for State regulation." (House Hearings, p. 384.)

Mr. Dozier DeVane, Solicitor to the Federal Power Commission and one of the draftsmen of the original bill, testified as follows:

> "At the outset of my discussion of title II, I pointed out the provisions in connection with the jurisdiction conferred by this title, called attention to the fact that insofar as rates were concerned, the title conferred jurisdiction upon the Federal Power Commission over wholesale rates that were not subject to control by State commissions under the decision of the Supreme Court in the Attleboro case. I also called attention to the fact that this bill preserves in the State commissions the power to regulate retail rates even where the power is transmitted in interstate commerce, and which might be

> regulated by this Commission; that we had reserved to the States the principle announced by the Supreme Court of the United States in the Pennsylvania Gas Co. case; that insofar as facilities were concerned, that the jurisdiction conferred upon the Federal Power Commission was that the Commission should have jurisdiction over transmission facilities that were used in interstate commerce and production facilities that were connected with such transmission facilities." (*Id.*, p. 518) [Subsequently, the bill was amended by eliminating Federal Power Commission jurisdiction over production facilities.]

In spite of these avowed limits on the jurisdiction conferred upon the Commission, the provisions of the original bill were broad and encountered considerable opposition. The bill as introduced (Senate Bill 1725) gave the Commission power to establish regional districts and control the production and transmission of electric energy (Section 203(a)), and control any addition or even repair to the facilities of a public utility (Section 203(b)).

With respect to persons subject to the Commission's jurisdiction, the bill as originally drawn provided in Section 201(a):

> "The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the *production* of energy for such transmission and sale, but shall not apply to the retail sale of energy in local distribution. The Commission shall have jurisdiction over all facilities for such transmission, sale, and/or production of energy by any means and over all facilities *connected therewith as parts of a system of power transmission situated in more than one State* . . ." (S. 1725, 74th Cong. 1st Sess., February 6, 1935):

Section 201(a), as it then read, did not contain the present provision that federal regulation is limited "to those mat-

ters which are not subject to regulation by the States." Witnesses before the Senate and House Committees pointed out that the broad provisions of Section 201(a) would subject to the Commission's jurisdiction many companies which do not engage in the business of selling or transmitting electric energy across a state line, but which were, at least indirectly, connected with "a system of power transmission situated in more than one State". The following testimony, given before the Senate Committee on Interstate Commerce, indicates the witness's apprehension of the broad jurisdiction proposed to be conferred, and the position of Congressional proponents of the bill that even the original draft was intended to impose jurisdiction only where a company sold energy directly across a state line, i.e., was engaged in the business declared to be interstate in the *Attleboro* case.

> "Mr. MacLane. . . . I shall not review these sections in detail, but I want to read from Section 201, which declares expressly that Federal jurisdiction shall extend not only to transmission and sale of energy in interstate commerce, but to the production of energy for such transmission and sale. The Federal Power Commission is given jurisdiction over all facilities for such transmission, sale, and/or production of energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities for the retail distribution of electric energy.
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> . . . . . .
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> ". . . A glance at the second map which I have inserted at the end of the memorandum will show you how far-reaching this jurisdiction is. Every line upon this system from the western boundary of Texas, Nebraska, Kansas, and the Dakotas clear to the Atlantic seaboard and from the Great Lakes to the Gulf is a part of an interconnected system ex-

tending into more than one State, and in most cases covering this entire map with complete interconnection except possibly some breaks at the Allegheny Mountains.

"This language gives to the Federal Power Commission here in Washington jurisdiction over that whole transmission network; and not only over the whole transmission network, but over every power plant connected with that network.

"The Chairman. You take it that it would have power over electrical energy which was just transmitted and used within the borders of a State?

"Mr. MacLane. If it is transmitted over this network, yes, sir; as I read the bill.

"The Chairman. *On what theory would they have jurisdiction? It is not a question of what the language in the bill may be, which would be broader than necessary, but after all, they would have no jurisdiction over purely intrastate electric energy.*

"Mr. MacLane. I think not.

"The Chairman. Or over a company that was doing a purely intrastate business?

"Mr. MacLane. I think not; but the bill, which is all I have to go by, gives to this Commission jurisdiction over the facilities for such transmission, sale, and/or production of energy and over all facilities connected therewith as parts of a system" (Hearings, Senate Committee on Interstate Commerce, S. 1725, 74th Cong., 1st Sess., pp. 338-339).

The bill as finally adopted struck out as facilities subject to the Commission's jurisdiction "production" facilities, and facilities "connected" with "a system of power transmission situated in more than one State." At the same time, as will be indicated in more detail below, the jurisdiction of the Commission was in many other respects greatly narrowed. It is difficult to reach any conclusion

but that the Congressional committees were impressed by the testimony which indicated that if jurisdiction were imposed on companies which did not themselves sell energy in interstate commerce, but were "connected" with other companies which eventually might have an interstate connection, the jurisdiction of the Commission would be extended far beyond the purposes of the proposed bill. It is surprising, therefore, to find the Federal Power Commission contending, as it did in its brief in the Court below (p. 19), that "It is the position of the Federal Power Commission that all facilities whatever their nature, constituting the closed circuit between the point of generation and the local distribution lines by means of which electric energy is afforded a pathway across state lines, and the person owning or operating the same are subject to the jurisdiction of the Commission". Seemingly, this flies in the face of the fact that Congress deliberately eliminated from the Commission's jurisdiction "connected" facilities, referred to in the original draft of the Act. The "literal" construction of Section 201(c) by the Court below likewise would create just the situation which Congress showed a clear intention to avoid.

Probably the most significant opposition to the bill in its original form came from the National Association of Railroad and Utilities Commissioners. That Association has for its membership the regulatory bodies of all the states, and indeed of many federal regulatory agencies as well. The Association endorsed federal regulation to close the "gap" in utility regulation. However, upon the appearance of the original draft of the bill, conferring broad jurisdiction on the Federal Power Commission, representatives of the Association went before the Senate and House Committees and voiced their opposition to the bill in its then form. The

Association accompanied its criticism with proposed amendments restricting the jurisdiction of the Federal Power Commission to those things which were beyond the constitutional powers of the state to regulate. The Honorable H. Lester Hooker, Chairman of the Corporation Commission of the Commonwealth of Virgina and then Chairman of the Legislative Committee of the Association, testified as follows:

> "Our association favors strict and adequate regulation by the States to the full extent of their power and by the Federal Government only to the extent that the power of the States cannot control" (House Hearings, p. 1610).
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> • • • • • •
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> "We propose to submit to this committee amendments, which will be intended to have the effect of preserving for the *exclusive* jurisdiction of the State commissions the regulation of certain matters, which are now, or may be, covered by State laws insofar as operating companies are concerned, such as the issuance of securities, management, and other service contracts, agreements between operating companies and affiliates with respect to the purchase and sale of property, and further providing, in accordance with the policy of the Federal Water Power Act, that whenever a State has laws dealing with the regulation of certain phases of the relations between the operating companies and the holding companies, the authority of the State shall be exclusive.
>
> "It has been repeatedly stated, by all of the representatives of the proponents of this bill who have appeared before this committee, that the avowed purpose of this legislation is merely to 'supplement', or to 'fill in a gap' in State regulation, and not to supplant, supersede, or duplicate the regulation within the power of the States in any respect. It

has been stated time and again by the proponents that it is their desire to leave unaffected and unimpaired the entire field to the maximum extent to which the States may be able to deal with this matter. This is the expressly avowed purpose of section 217 of title II of title II; according to Dr. Splawn, who was very specific on this point in his statement on the holding company section, and Commissioner Seavey and Mr. DeVane, of the Federal Power Commission, are likewise very specific with regard to title II and III of title II" (*Id.*, p. 1611).

* * * * * *

"We favor the regulation by the Federal Power Commission of service and rates for the sale at wholesale in interstate commerce of electric energy and natural gas, but we do not favor titles II and III of title II, as drawn in this bill covering these matters, because the bill, as drawn, goes far beyond the mere regulation of the service and rates with respect to the transmission and sale of electric energy and gas at wholesale, which is the only gap in State regulation of the operating companies. Titles II and III of title II substantially substitute Federal regulation and control for State regulation over nearly all important power plants and transmission lines, which constitute the greater part of the properties of the operating companies" (*Id.*, p. 1612).

Mr. John E. Benton, General Solicitor of the National Association of Railroad and Utilities Commissioners, also testified with respect to the position of the Association, and presented amendments proposed by the Association to meet the objectives outlined by Commissioner Hooker. Mr. Benton stated the general position of the Association as follows:

"It is our position that Congress should fill in the gap and provide for regulation of wholesale rates

both in the case of gas and electricity for the protection of the consumer, and for the protection of the stockholder of the operating utility" (House Hearings, p. 1629).

"We have, accordingly, sought to make it as clear as language will that Congress does not in this case intend to regulate anything except interstate power, sold at wholesale." (House Hearings, p. 1638).

Mr. Benton referred to the fact that President Roosevelt, in creating the National Power Policy Committee, said with reference to legislation to be enacted by Congress:

"Since a number of the States have commissions having jurisdiction over interstate power matters, it is necessary that whatever plan is developed should have regard to the powers of these various State Commissions as well as of the States in general" (*Id.*, p. 1638).

With respect to the jurisdiction proposed to be conferred on the Federal Power Commission by the bill in its original form, Mr. Benton proposed, on behalf of the Association, that the draft be amended so as to make clear that the existing jurisdiction of the States was preserved, and that jurisdiction should be exercised by the Federal Power Commission only in matters beyond the powers of the states under the Constitution. The amendment proposed by Mr. Benton is reprinted below, together with Section 201 of the bill as originally drafted (H. R. 5423), and Section 201 (a) of the Act as finally adopted.

Section 201 of Original Bill (H. R. 5423)

"Section 201. (a) The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, except where such electric energy is sold for use within the State in which it is generated. The Commission shall have jurisdiction over all facilities for such transmission/ sale, and/or production of energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities for the retail distribution of electric energy . . . Every person who owns or operates facilities subject to the jurisdiction of the Commission under this title and every person who controls, directly or indirectly, any such person, shall be subject to the provisions of this Act. The term 'public utility' when used in this Act means any person who owns or operates such facilities."

Proposed Amendment of N. A. R. U. C.

"Section 201. (a) It is hereby declared that the business of generating, transmitting, and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation, in accordance with the provisions of this title, of that part of said business which is not subject to regulation by the States is necessary in the public interest. It is recognized, however, that the overwhelmingly preponderant part of the electric business is intrastate and local; and nothing contained in this title shall be construed to extend Federal regulation to that part of said business which is subject to regulation by the States."

Section 201(a) as f enacted

"Section 201. (a) hereby declared th business of tra ting and selling el energy for ultima tribution to the p is affected with a p interest, and that eral regulation of ters relating to ge tion to the extent vided in this Par the Part next follo and of that part of business which co of the transmissio electric energy in i state commerce and sale of such energ wholesale in inte commerce is nece in the public inte such Federal re tion, however, to ex only to those ma which are not su to regulation b States."

After the public hearings, the Senate Committee on Interstate Commerce discarded the *entire* original bill, and submitted to the Senate a new bill (S. 2796) conferring much narrower jurisdiction upon the Federal Power Commission. Senator Wheeler, Chairman of the Committee, and a co-sponsor of both the Federal Power Act and the Public Utility Holding Company Act of 1935, stated in the Committee's report (Sen. Rep. No. 621, 74th Cong., 1st Sess.):

> "As has been stated, the committee has liberalized title II of the original bill and endeavored to remove all possible grounds for the charge that it imposes harsh or burdensome restrictions upon the electric industry. *The revision has also removed every encroachment upon the authority of the States.* The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters" (p. 18).

The House Committee on Interstate and Foreign Commerce imposed limitations on the jurisdiction of the Federal Power Commission beyond those added by the new Senate bill. In fact, the House Committee discarded the Senate bill and introduced a new bill (House Act, S. 2796, adopted June 24, 1935) which excluded from the jurisdiction of the Commission generating or production facilities, as well as jurisdiction over facilities "connected with" "a system of power transmission situated in more than one state". At the same time Section 201(a) was changed to include the provision that federal regulation should extend "only to those matters which are not subject to regulation by the States". On this version of the bill, Chairman Ray-

burn reported as follows (H. R. Rep. No. 1318, 74th Cong., 1st Sess.):

> "Under the decision of the Supreme Court of the United States in *Public Utilities Commission* vs. *Attleboro Steam & E. Co.*, (273 U. S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. *Part II gives the Federal Power Commission jurisdiction to regulate these rates.* A 'wholesale' transaction is defined to mean the sale of electric energy for resale and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce . . . " (p. 7)
>
> "The bill takes no authority from State commissions . . . The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority . . . *Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.*" (p. 8)

It is ironical that Jersey Central has been held to be a "public utility" even though subject to regulation by a state commission which has comprehensive regulatory powers (see *infra*, pp. 75-77, and Appendix A to this brief, printed separately), and which "recognized the responsibilities of State regulatory commissions" by the carefully considered conditions imposed on the approval of the stock transfer in the case at bar (R. 7-8). It is difficult, if not impossible, to read the legislative history of the Act without concluding that such a company as Jersey Central was not intended to be included in the definition of "public utility", since its operations are wholly intrastate and do not involve any "gap" in regulation. The Congressional intent is equally clear that the jurisdiction of the states was to be preserved in every way, and that where a state had jurisdiction over a given transaction such as

the stock acquisition approved by the New Jersey Board of Public Utility Commissioners in this case, that jurisdiction was not to be superseded or interfered with by federal regulation.

(f) The intent of Congress to exclude a company such as Jersey Central from the jurisdiction of the Federal Power Commission is revealed by judicial construction of the phrases "in interstate commerce" and in "intrastate commerce".

In pursuing the question of Congressional intent, in order to ascertain the meaning of Section 201 of the Act, it is helpful to resort to opinions of this Court determining when transportation is "in interstate commerce" or "in intrastate commerce". (See, for instance, subsection (b) of Section 201, granting and withholding jurisdiction). In this portion of the argument, petitioners do not suggest that a narrow construction should be given to the constitutional powers of Congress under the Commerce Clause. That question has been resolved in favor of the national legislature by the recent decisions of this Court in *Wickard* v. *Filburn*, 11 U. S. L. W. 4011 (November 9, 1942) and in the six cases cited by Mr. Justice Jackson in his opinion therein:

United States vs. *Darby*, 312 U. S. 100 (1941);
Gray v. *Powell*, 314 U. S. 402 (1941);
Wrightwood Dairy Co. v. *United States*, 315 U. S. 110 (1942);
Cloverleaf Co. v. *Patterson*, 315 U. S. 148 (1942);
Kirschbaum v. *Walling*, 316 U. S. 517 (1942);
Overnight Transportation Co. v. *Missel*, 316 U. S. 572 (1942).

The question of Congressional intent is all important. As stated by Mr. Justice Frankfurter in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349 (1941):

"This case presents the narrow question of what Congress did, not what it could do . . .". (P. 356).

It is important to note that in both subsections (a) and (b) of Section 201 of the Act, the phrase "*in* interstate commerce" is used to describe the relationship to commerce of facilities which are subject to the jurisdiction of the Commission, and in subsection (b) the phrase "in intrastate commerce" is used to determine what facilities are *not* subject to commission jurisdiction. To determine the meaning of this particular usage, it is proper to resort to the decisions of this Court to clarify the pattern in which Congress legislated.

An attempt will be made to use analogies comparable to the facts here involved, taken from various types of decisions of this Court. These decisions deal with various facets of the question whether transmission "in interstate commerce" is involved in the transmission of a commodity by A to B within one state, and in the further transmission of such commodity by B to C in another state.

State Tax Cases

The leading case on this type of problem as it has been presented in state tax cases is *Coe* v. *Errol*, 116 U. S. 517 (1886). Logs had been shipped down stream in New Hampshire with the intention on the part of the shipper of ultimate shipment from New Hampshire to Maine. At Errol, New Hampshire, they stopped in the river awaiting further transportation. It was held that the logs were subject to local taxation by Errol, and that to determine whether the logs were in interstate commerce, the test is: When do they "commence their final movement for transportation from the state of their origin to that of their destination"?

Petitioners submit that *Coe* v. *Errol* cannot be minimized as a "tax" case*, nor as being limited or modified by the cases which have reaffirmed the plenary *constitutional* powers of the national legislature first expounded by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. (22 U. S.) 1 (1824). Nor does the delay in *Coe* v. *Errol* distinguish it from the case at bar, since delay is important only because from it arises the possibility of control of disposition in the state of origin. In the transmission of electricity in the instant case, such power of disposition is completely out of the control of the petitioner, Jersey Central, and it is within the sole control of Public Service, which owns the bus bar and which has the power of keeping energy completely away from Staten Island at any time. In *Coe* v. *Errol* the Court wrote:

> "The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or other-

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* See *Atlantic Coast Line* v. *Standard Oil Company*, 275 U. S. 257 (1927), a rate regulation case, decided on authority of *General Oil Company* v. *Crain*, 209 U. S. 211 (1908), a tax case. See also the statement of Representative Cole, 79 Congressional Record, page 10386, commenting on *South Carolina Power Co.* v. *South Carolina Tax Commission*, 52 Fed. (2nd) 515 (1931), affirmed, 286 U. S. 525 (1932), and stating that tax cases were considered as authority by the House Committee on Interstate and Foreign Commerce for delimiting "interstate commerce" in the Federal Power Act. See also *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36 (1917), an employer's liability case decided on the authority of *Coe* v. *Errol*.

> wise disposed of within the State, and never put in course of transportation without the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri* and not at all a fixed and certain thing." (p. 528)

It should be noted too that in *Coe* v. *Errol*, exportation was intended by the shipper—even while the goods were in the river itself—and yet the Court held that the commerce was intrastate until exportation was *a fixed and certain thing*. In the instant case routing at the bus bar of *Public Service* determines the course of disposition of all energy coming to the bus bar from any source, and therefore Public Service, not Jersey Central, transmits energy "from a State."

Comparable to *Coe* v. *Errol* and following it are:

> *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82 (1903);
> *New York* v. *Knight*, 192 U. S. 21 (1904);
> *General Oil Co.* v. *Crain*, 209 U. S. 211 (1908);
> *Bacon* v. *Illinois*, 227 U. S. 504 (1913);
> *Minnesota* v. *Blasius*, 290 U. S. 1 (1933);
> *Federal Compress and Warehouse Co.* v. *McLean*, 291 U. S. 17 (1934).

On the other hand, if the shipment is by a seller across a state line to an agent of the seller who is thereafter to make deliveries to the purchaser at various places within the same state as the agent, the goods, during this entire period of transit, are held to be in interstate commerce, beyond the taxing power of the state, for the reason that

they were *destined* to each of the several points of ultimate delivery (*Western Oil Ref. Co.* v *Lipscomb*, 244 U. S. 346 (1917); or if oil or gas is shipped by a seller within a single state, under a contract which itself contemplates further transportation to points outside the state, the shipment is interstate (*United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277 (1921); see also *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265 (1921)*); or if the intention of the owner and the absence of "*control* . . . to change destination" is clearly indicative of interstate transportation, it will be held such. (*Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366, 377 (1912)) Note, however, that if the seller parts with control in a given state, the transaction is intrastate even though customarily the buyer takes the article to a second state, the seller being "indifferent" to such second transporta-

* The *Hallanan* cases referred to by the Court below (R. 1133) involved the validity of state statutes taxing pipe line owners on the transportation of oil or gas from one state to another. From 80% to 90% of the oil carried in the pipe lines moved directly to the second state. Under those circumstances, the Court held that the movement of the oil in the pipe line was a movement in interstate commerce and not taxable since "the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which in fact it arrived. We repeat that the pipe line company not the producer was the master of the destination of any specific oil. Therefore its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed" (p. 272). Unlike the situation in case at bar, the tax in the *Hallanan* case was directed against the pipe line company and not the original producer, and it was the intent and control, exercised by the pipe line company as the agency which actually directed the flow of oil across the state line that determined the character of the commerce. In the case at bar it is Public Service, not the "producer" Jersey Central, which is the master of the destination of the energy.

tion (*Superior Oil Co.* v. *Mississippi*, 280 U. S. 390 (1930)). Of comparable significance is *Department of Treasury* v. *Wood*, 313 U. S. 62 (1941), in which this Court held that "the transactions [sales of railroad ties] were nonetheless intrastate activities because the ties thus sold and delivered were *forthwith* loaded on railroad cars" which immediately transported the ties into another state.

Through or Local Rate or Service Cases.

The problem of what is "in interstate commerce" arises in the determination of the proper rate to be charged when a shipment of goods goes through intrastate and interstate, or interstate and intrastate, journeys or phases successively. Such cases as *Gulf, etc. R. Co.* v. *Texas*, 204 U. S. 403 (1907), and *Public Utilities Commission* v. *Landon*, 249 U. S. 236 (1919) are of this type.

In *Gulf, etc. R. Co.* v. *Texas, supra*, a car of grain had originated in South Dakota, and was sold to a firm of commission merchants in Kansas City, who had it shipped to themselves at Texarkana, Tex. En route the grain was sold as at Texarkana to a third party, who used it to fill an order from his own purchaser further on in Texas. The Court held that the local rate should be charged for the last leg of the journey from Texarkana.

In *Public Utilities Commission* v. *Landon, supra*, the Court held that sale of gas at the burner tips by a company which had purchased it from another company which had piped the gas into the state, was in intrastate commerce, since the interstate commerce was said to end upon the introduction of the gas into the service pipes of the distributor. See also *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465 (1931), a tax case.

These decisions are explained in *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.*, 314 U. S. 498 (1942), in

relation to the enactment by Congress of the Natural Gas Act (52 St. 821, 15 U. S. C. A. §717). In that case an application for service for local distribution by an Illinois company from a wholly owned subsidiary of an interstate company was held to be subject to national rather than state regulation. The Natural Gas Act contains no section comparable to subsection 201(a) of the Federal Power Act. Nor does it contain a section comparable to subsection 201(b) of the Act. The Court held that the mechanical test of reduction of pressure formerly applied to these gas cases would not apply to the particular question of regulation here involved. The gas moved in a continuous flow from an interstate company through the pipes of its wholly owned subsidiary to the proposed point of distribution to the local company. Referring to a long term contract for the supply of gas by the parent to the subsidiary the Court wrote:

> "Pursuant to the *mutual agreement* of the two companies, the gas is transported in continuous movement through the pipe line into the state and through appellant's pipes to the service lines of the distributors, where appellant delivers it to them." (p. 503).

In *such a transaction*, the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to *the intended* destination, does not affect the essential interstate nature of the business (pp. 503-504).

In *Southern Pacific Co.* v. *Arizona*, 249 U. S. 472 (1919) a traveling show had applied in Tucson, Arizona, to the Southern Pacific Company to transport eighteen cars from Tucson to Phoenix via Maricopa. The railroad company refused, alleging that it had a contract with another person not to carry any other show for a period of thirty days, and because it would only serve at interstate rates. The traveling show applied for relief to the state commission, which fixed an intrastate rate. Concededly, the show was in

transit from El Paso, Texas, through Arizona and New Mexico to California. The Court said:

> "... it is plainly impossible to say that the property and persons constituting the shipment of the shows here involved were in progress of interstate transportation when the Arizona Commission entered its order on March 25 that the company should accept the intrastate shipment from Tucson to Phoenix. For at that time the shows were in the exclusive *possession and control of the owner*, exhibiting for six days at Tucson, and the application to the Southern Pacific Company, which was refused, shows, incontrovertibly, that the transportation to Tucson had terminated, and that no other transportation had been contracted for" (p. 477).

In the case at bar, petitioner Jersey Central had no intention or knowledge that its intrastate transmission to Public Service would, by a most unusual combination of circumstances, be transmitted by Public Service to Staten Island. Again, in a problem of this kind, it is *control of destination* which is determinative. A rest or pause is evidence of control; no more, no less.

In *Oregon-Washington R. & Nav. Co.* v. *Strauss & Co.*, 73 F. (2d) 912 (1934), cert. den. 294 U. S. 723 (1935), which involved the application of interstate or intrastate freight rates, the action being brought by a carrier against a shipper for an underpayment, there is a cogent statement by the Circuit Court of Appeals, Ninth Circuit, of the principles governing cases of this kind. The defendant was in the business of buying, selling, shipping and exporting wheat, and the complaint alleged that at all times it had a substantial number of outstanding contracts for sales to California and foreign destinations from Oregon, its place of business. Wheat was shipped from the interior of Oregon to a dock at Portland, owned by a subsidiary of defendant, and there trans-shipped by boat. The District Court had sustained a

demurrer to the complaint and its action was affirmed in the Circuit Court. The important cases in this field were collected and cited by the opinion, which summarized its conclusion as follows:

> "Under the decisions, it is clear that two elements are indispensable to constitute an interstate or foreign shipment:
>
> "(1) There must be a through and continuous movement from one state to another, or to a foreign country;
>
> "(2) There must be, *at the time the movement is started*, an intention that the shipment shall be interstate or foreign, and this intention must be carried out. In a word, there must be the intent and the event" (p. 914).

Atlantic Coast Line v. *Standard Oil Co.*, 275 U. S. 257 (1927), is practically the converse of the case at bar. There the interstate phase preceded the intrastate phase. The question was as to the applicability of interstate or intrastate rates for oil shipments from one place in Florida to another, when plaintiff oil company received oil from outside the state, and poured it into the tanks from which oil was being taken at the same time in practically a continuous flow, for shipment inside the state. The Court wrote:

> "It seems very clear to us on a broad view of the facts that the interstate or foreign commerce in all this oil ends upon its delivery to the plaintiff into the storage tanks . . . at the seaboard, and that from there its distribution . . . is all intrastate commerce. This distribution is the whole business of the plaintiff in Florida. There is no destination intended and arranged for with the ship carriers in Florida at any point beyond the deliveries from the vessels to the storage tanks or tank cars of the plaintiff. There is no designation of any particular oil for any particular place within Florida

beyond the storage receptacles or storage tank cars into which the oil is first delivered by the ships. The title to the oil in bulk passes to the plaintiff as it is thus delivered. When the oil reaches these storage places along the Florida seaboard, it *is within the control and ownership of the plaintiff* for use for its particular purposes in Florida. The plaintiff is free to distribute the oil according to the demands of its business. . . . (p. 267).

"There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company, at Tampa, Port Tampa, Jacksonville or the St. Johns River terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it. (p. 270)

"We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate." (p. 271)

In these cases the question of control by the shipper as to when a shipment is to end is important, as in the tax cases previously cited. The language of *Coe* v. *Errol* could be applied to any of the situations presented.

Private Law Cases.

The necessity for delimiting "interstate commerce" and "intrastate commerce" can arise in other situations. In *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36 (1917), the case turned on whether or not an employee was engaged in interstate commerce under the Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. A. §51). The plaintiff was a brakeman on a logging railroad, owned by the shipper, and was injured. The logs were to be put in Puget Sound

and afterwards sold in interstate commerce. There had been no prior sale. It was held that plaintiff was in intrastate commerce, and could not recover. The decision was put squarely on the precedent of *Coe* v. *Errol, supra.*

In *New York Central Railroad* v. *Mohney,* 252 U. S. 152 (1920), a situation obtained which is most interesting and important in the solution of the problem as to the character and status of interstate and intrastate phases of transportation. No question of federal or state power was involved. The Court simply had to decide the validity of a release provision in an application for a pass by an employee of a railroad. He had an annual pass between certain points in Ohio and used it on the occasion in question from Toledo to Cleveland, en route to Pennsylvania to attend the funeral of his mother. Surely this was a single journey, if ever there was one. At Cleveland he was to pick up a trip pass on another railroad. If he was in interstate commerce en route to Cleveland, the federal law which upheld the release governed. If in intrastate commerce, the Ohio law which invalidated the release governed. The journey to Cleveland was held to be intrastate by this Court, which affirmed a judgment of the Ohio Court of Appeals for the plaintiff. That Court had held that the transportation involved was interstate in character, but the plaintiff prevailed on another ground. This Court specifically held the transportation intrastate, and disapproved ground upon which the Ohio court rested its decision.

* * * * * * *

No attempt has been made by the foregoing presentation to submit an exhaustive or an encyclopedic collection of the cases where courts have had to determine the question whether particular transportation is in interstate or in intrastate commerce. But these cases which have been

presented are, we believe, typical. Their usefulness is suggested by the approach to a somewhat similar problem taken by Circuit Judge Learned Hand, speaking for a three-judge District Court in *Baltimore & Ohio R. Co.* v. *United States*, 15 F. Supp. 674 (1936). The case arose as a "usual suit in equity to review the action of the Interstate Commerce Commission which directed the plaintiff railroads to establish through rates" in the circumstances of the case,—a shipment of goods from one state to another with periodic stops for processing.

> "It is common to call the question one of fact; and conventionally it may be so, just as negligence is called a question of fact. But strictly it is not; *we are after a standard*, and because the law does not furnish an express one, we ought not disguise what we do by a misleading mask, even though that is especially comforting, where as here the standard is elastic and the decision must in substance be a choice." (pp. 676-7)

After reviewing many of the pertinent decisions of this Court, Judge Hand stated and classified them in categories appropriate to the case at bar. This technique illustrates what must be done in every case when "we are after a standard" appropriate to the application of concepts of "interstate commerce" and "intrastate commerce" to traffic in any commodity, whether it be logs or electricity.

Applying the technique suggested by Judge Hand to the cases, certain conclusions may be drawn:

1. So long as Congress makes the test of regulation depend upon whether a shipment, or an activity, or a transportation, or a transmission, or a sale, is *in* interstate commerce, the words must be construed within the pattern of prior judicial decisions from other fields and involving other issues.

2. The phrase, "*in* interstate commerce," is the strictest test of jurisdiction available to Congress.

3. Where a particular transportation or transmission has several possible phases, intrastate preceding interstate, or interstate preceding intrastate, and it has been necessary to make a determination as to the proper distribution of interstate or intrastate characteristics, attributes and consequences, the courts have used various evidentiary factors to determine whether there was certainty of destination in the mind of the shipper at the beginning of the journey.

4. Resolution of the question of interstate or intrastate commerce may be aided by factual tests: time and place of passage of title, pause, delay, the use of agents, factors, commission men, the form of the bill of lading, the reduction, in the case of gas, of pressure at the point of transfer, etc. However, in order to determine whether there was certainty of destination in the mind of the shipper at the beginning of the journey, the courts have emphasized *intention of and control by the shipper* as to the destination of the product.

5. Since, as this Court held in *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 180 (1932), "however lacking it may be in body or substance, electrical energy, nevertheless, possesses many of the ordinary tokens of materiality", transmission of such energy would seem clearly to possess attributes of other types of transportation, namely, that there is a start, a period of transportation, and a receipt; and that such electrical energy is capable of transportation in successive phases in the same manner as other articles of commerce.

6. Congress, by deleting "production" from the words descriptive of the subject of regulation as they appeared

in the original draft of the Act (see *supra*, p. 5, and compare with present Section 201), clearly indicated its own view that generation and receipt were not to be treated as instantaneous.

7. The construction of the bus bar indicates that control of the disposition of the energy at any time, and therefore at all times, was in Public Service, the owner, possessor and operator of the bus bar; and that instead of being merely a conductor, actually the bus bar was the *transmitting* (in the sense of "across-sending") facility in the instant case.

8. Therefore under the meaning of the phrase "in interstate commerce", as used in Section 201 of the Act, and as universally construed by the courts in many cases in comparable fields of federal regulation, petitioner Jersey Central has no facilities used for the transmission of electrical energy "*in* interstate commerce," nor does it sell at wholesale in "interstate commerce"; but instead all its facilities, including the seven-eighths mile of wire in question, are engaged only in transmission of energy in intrastate commerce. Such intrastate commerce includes the transmission of energy to the Mechanic Street substation owned, possessed, controlled and operated by Public Service, in which its future course is determined without any interference or control by petitioner Jersey Central. A contrary interpretation of the Act would mean that Jersey Central's status as a "public utility" would be in the control of Public Service or, so far as Jersey Central might be aware, of some other consumer, whose actions Jersey Central would not control, and the method of whose operations might be unknown to it and unascertainable, except as a result of the exercise of governmental investigative powers.

9. By this analysis, as by all the others possible in the case, petitioner Jersey Central is not a "public utility" within the purview of the Act.

POINT II.

The Court below erred in failing to hold that subsection (a) of Section 201 of the Act excludes Federal Power Commission jurisdiction over Jersey Central.

(a) Under subsection (a) of Section 201 of the Act, Federal regulation under the Act does not extend to matters subject to regulation by the States.

Under subsection (e) of Section 201 of the Act the status of a person as a "public utility" is made to depend upon the jurisdiction of the Commission over facilities owned or operated by it. Subsection (b) of the same section enumerates the powers granted to the Commission and the facilities subject to its jurisdiction, and at the same time lists powers which the Commission is forbidden to exercise, and facilities over which the Commission has no jurisdiction. The jurisdiction of the Commission is further limited by the scope of the Act itself, as stated in subsection (a) of Section 201. That subsection provides that regulation under the entire Act (except for Part I, dealing with hydroelectric licensees) is to extend "only to those matters which are not subject to regulation by the States." With reference to this subsection, the Report of the House Committee on Interstate and Foreign Commerce said:

> "Subsection (a) contains a declaration of policy, states the necessity for Federal regulation, and *defines the scope of that regulation.*" (Report of House Committee on Interstate and Foreign Commerce, No. 1318, 74th Cong., 1st Sess., p. 26.)

Both subsection (a) and subsection (b) evidence the intention of Congress to limit the Commission's jurisdiction to companies engaged directly in the sale or transmission of electric energy in interstate commerce, and to leave undisturbed the regulatory powers lawfully exercised by the states. In other words, the purpose of the Act is to provide for federal regulation of "that part" [subsection (a)] of the business of electric companies which this Court, in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927), held not subject to regulation by the states.

It may be well to recount briefly the facts in the *Attleboro* case. Narragansett Electric Lighting Company, engaged chiefly in supplying electricity at retail in Providence, Rhode Island, sold electric energy to Attleboro Steam & Electric Company, a Massachusetts company, directly across the state border by means of a connecting transmission line. In fact, the energy was not metered until it reached Massachusetts. The Public Utilities Commission of Rhode Island attempted to fix the rate which the Massachusetts company should pay the Rhode Island company for energy purchased over this line. This Court held, as the parties conceded, that the sale of electric energy was a transaction "*in* interstate commerce", and that the question of regulating the wholesale rate for such energy was national rather than local, and therefore not subject to regulation by Rhode Island, even in the absence of any attempt by Congress to occupy the field.

The intention of Congress, evidenced in many places in the legislative history of the Act (*supra*, pp. 44, 45, 53, 54), to restrict federal regulation to filling the "gap" brought about by the *Attleboro* case, resulted directly in the language of subsections (a) and (b) of Section 201.

The importance of subsection (a), as indicating the intention of Congress, is made clear by the recent decision of this Court in *United States* v. *N. E. Rosenblum Truck Lines, Inc.*, 315 U. S. 50 (1942). In that case a motor carrier applied for a certificate or permit to continue operation under the so-called "grandfather" provisions of Sections 206(a) and 209(a) of the Motor Carrier Act of 1935 (49 Stat. 551, 552, 49 U. S. C. A. §§306, 309). The applicant had been in the business of hauling for common carriers, rather than private shippers, prior to the critical date fixed by the Act. The following language from the opinion of Mr. Justice Murphy indicates the question involved and the disposition thereof by the Court:

> "The question here, as in any problem of statutory construction, is the intention of the enacting body. Congress has set that forth for us broadly in the declaration of policy—in essence it is the regulation of transportation by motor carriers in the public interest so as to achieve adequate, efficient and economical service. (p. 53)
>
> * * * * * * *
>
> "Appellees' contention that their activities on the critical date fall within the literal language of the definition of 'contract carrier' in force on the date of the order and that they are therefore entitled to contract carrier 'grandfather' rights is without merit. A holding that the activities of appellees prior to February 1936 were those of contract carriers would not accord with the intent of Congress. *Where the plain meaning of words used in a statute produces an unreasonable result, 'plainly at variance with the policy of the legislation as a whole,' we may follow the purpose of the statute rather than the literal words.*" (p. 55)

The italicized portion of the opinion makes clear the basic error committed by the Court below in applying "literally"

(R. 1133) the provisions of subsection (c) of Section 201, even though such construction resulted in conferring jurisdiction on the Federal Power Commission over a company whose facilities and operations are subject to state regulation, and over a specific transaction not only subject to regulation by the State of New Jersey, but approved by the duly authorized Board of Public Utility Commissioners of that State. A result more directly in conflict with the intention of Congress, as shown by subsection (a), can hardly be imagined.

As a matter of fact, the Federal Power Commission itself has relied on subsection (a) of Section 201 in construing another subsection of Section 201, namely, subsection (f), which excludes from the provisions of the Act the United States, any of the states or political subdivisions thereof. In asserting jurisdiction over the sale in interstate commerce of electric energy at wholesale to municipalities, in spite of the provisions of subsection (f), the Commission said (*Matter of Otter Tail Power Company*, 33 P. U. R. (N. S.) 257 (1940)):

> "The Federal Power Act of 1935 had its genesis in a desire to implement state regulation by placing for the first time under the jurisdiction of a Federal agency electric public utilities, interstate in character, considered beyond the sphere of State control. * * * *The congressional declaration of policy is indicative of the regulation contemplated. This declaration [is] contained in the first paragraph of Part II of the Act.* * *". (p. 260)

It is amazing, therefore, to find that the only construction or even recognition given by the Commission in the case at bar to subsection (a) was the statement in the Commission's brief below (p. 17) that subsection (a) is

"nothing but a preamble" and "neither adds to nor detracts from" the meaning of the statute. The refutation of this position will be found in *United States v. N. E. Rosenblum Truck Lines, Inc., supra,* in the language of the Act itself, and in the legislative history of the Act.

Where it was the intention of Congress to limit the effect of subsection (a) of Section 201, such limitation has been expressed in the Act itself. These limitations appear, for example, in connection with the Federal Power Commission's jurisdiction over the issuance of securities by a "public utility", and over accounting matters with respect to "public utilities". Thus, Section 204(f) of the Act (49 Stat. 851, 16 U. S. C. A. §824c(f)) provides as follows:

> "The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State *commission.*"

At first glance, such provision might appear unnecessary in view of the provisions of subsection (a) that federal regulation shall not extend to matters subject to regulation by the states. However, the term "State commission", used in Section 204(f), is a statutory term, defined in Section 3(15) (49 Stat. 838, 16 U. S. C. A. §796 (15)) of the Act to mean the regulatory body of a state having jurisdiction to regulate "rates and charges for the sale of electric energy" to consumers within the state. Thus, in order to exclude Federal Power Commission jurisdiction over the issuance of securities by a "public utility", it is not enough that the issuance of such securities be subject to regulation generally by the states, through general corporation statutes, Blue Sky Laws, State Security Acts, and the like. Specific approval by a "State commission", as defined in the Act, is required.

Likewise, Section 301(a) provides that the Commission shall have jurisdiction to prescribe how a "public utility" shall keep its accounts, but there is specific proviso that "nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State." Section 301(a), therefore, is an instance where Congress has provided for *dual* jurisdiction by the state and by the federal government. In the absence of this provision it would have been possible to construe the original draft of the Act (H. R. 5423, 74th Cong. 1st Sess.) to mean that exclusive jurisdiction over accounting matters was intended to be vested in the Federal Power Commission, rather than the states. Mr. John E. Benton, General Solicitor to the National Association of Railroad and Utilities Commissioners, proposed, on behalf of the Association, that the proviso quoted above from present Section 301 be inserted. He said:

> "We also ask to have section 301 amended; as it stands that would forbid public utilities to keep any accounts except those prescribed by the Federal Commission. We seek to have that modified so that it will not prevent them from keeping such accounts as the State commissions may require, for State purposes" (House Hearings, p. 1689).

It is therefore evident that subsection (a) of Section 201 means precisely what it says, subject to such exceptions as Congress chose to make in connection with the issuance of securities by a "public utility" and the keeping of accounts by a "public utility". In all other respects, the jurisdiction of the Commission is limited to such matters as are beyond the power of the states to regulate.

(b) The business of Jersey Central, its facilities and their operation, are completely subject to regulation by the State of New Jersey.

The record in this case contains undisputed evidence that Jersey Central is a corporation chartered by the State of New Jersey, and that it owns, operates, manages and controls within that state electric light, heat and power plants and equipment for public use (R. 290). At the hearing before the Commission, counsel for Jersey Central offered by reference the statute of New Jersey defining the jurisdiction of the New Jersey Board of Public Utility Commissioners, and the examiner stated that notice would be taken of the statute of the state (R. 290-1). Excerpts from the New Jersey statute, dealing with regulation of public utilities in that state, have been reprinted separately as Appendix A to this brief. The New Jersey statute provides (N. J. S. A. 48:2-13) that the Board shall have general supervision and regulation of and jurisdiction and control over such companies as Jersey Central, in the following language:

> "The board shall have general supervision and regulation of and jurisdiction and control over all public utilities as hereinafter in this section defined and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this title." (N. J. S. A. 48:2-13).

The provisions of the statute include the power to fix rates, to require the filing of rate schedules, to suspend proposed increased rates (N. J. S. A. 48:2-21) and to enter into compacts on behalf of the State of New Jersey with other states for the joint regulation and control of rates for electricity transmitted between States (N. J. S. A. 48:2-22). The Board or the members thereof whenever authorized by Act

of Congress may exercise any power or authority over *interstate* commerce (N. J. S. A. 48:2-15). Some of the other powers given to the Board include the power to compel any utility to furnish safe, adequate and proper service (N. J. S. A. 48:2-23; and see *id.* 48:3-3), to make reasonable inspection of its metering facilities (N. J. S. A. 48:2-20), and to require every public utility to keep its books and accounts according to a uniform system prescribed by the Board (N. J. S. A. 48:2-16).

The Board has jurisdiction over the sale, lease, mortgage or other disposition of the facilities of a public utility (N. J. S. A. 48:3-7), and no public utility may transfer upon its books any share of its capital stock to any other public utility unless authorized to do so by the Board (N. J. S. A. 48:3-10). As stated previously, *the Board approved the very transfer of stock which gave rise to this case* (R. 5-8).

Without the approval of the Board as to legality, fairness and advisability, no contract for management or other services can be made between a New Jersey public utility and any company affiliated therewith by a 5% or more capital stock ownership (N. J. S. A. 48:3-7.1). A public utility is forbidden without authorization of the Board to lend its money to any one holding or controlling separately or in affiliation with another 5% or more of the capital stock of such utility (N. J. S. A. 48:3-7.2).

The above description of the New Jersey statute is not complete. It indicates plainly, however, that Jersey Central is and has been subject to the most comprehensive and pervasive state regulation, since prior to the enactment of the Federal Power Act.* The sale of energy by Jersey

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* A tabulation appearing in *State Commission Jurisdiction and Regulation of Electric and Gas Utilities*, Federal Power Commission (1941), in which the Commission col-

Central to Public Service from its South Amboy plant in New Jersey is subject to regulation by the Board, and the record indicates that Jersey Central reports such sales monthly in detail to the New Jersey Board (R. 291). If the New Jersey Board determined that the rendition of safe and adequate service to Jersey Central's customers in New Jersey required that the economy flow arrangement cease, there is no question of the power of the New Jersey Board under the provisions referred to above to bring about such cessation (N. J. S. A. 48:2-23 and 48:3-3).

Consequently, Jersey Central is not a "public utility" as defined in the Federal Power Act, not only since Jersey Central does not own or operate facilities for transmitting electric energy in interstate commerce, but in addition, the facilities of Jersey Central, including the seven-eighths of a mile of transmission line from its South Amboy plant and its sale of electric energy to Public Service, are fully subject to regulation by the New Jersey Board.

POINT III.

Approval by the New Jersey Board of Public Utility Commissioners of the acquisition by New Jersey Power of the stock of Jersey Central excludes jurisdiction over such transaction by the Federal Power Commission.

As stated previously, subsection (a) of Section 201 defines the scope of the regulation contemplated by the entire Act (except Part I thereof, not relevant here). Thus, it is stated that "Federal regulation" is necessary with

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lected data as to the scope of state regulation of privately owned electric utilities, indicates that, of the thirty different phases of regulation investigated, twenty-eight were listed as within the jurisdiction of the New Jersey Board of Public Utility Commissioners.

respect to matters relating to generation to the extent provided in Parts II and III, and with respect to that part of the business of transmitting and selling electricity for ultimate distribution to the public which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce. The "business" referred to obviously includes more than the mechanical operation of a specific piece of electrical apparatus or a transmission line. The term "business" includes the entire commercial enterprise necessary for the transmission and sale regulated by the Act.* Consequently, "Federal regulation" of the "business" referred to in subsection (a), includes regulation of the acquisition or disposition of physical assets (even non-utility assets) and the acquisition of securities of a "public utility" (Section 203(a)), the issuance of securities by a "public utility" (Section 204), the keeping of accounts and records by a "public utility" (Section 301), and the like.

It is this entire "Federal regulation" that is limited by the last clause in subsection (a), which provides that such regulation shall "extend only to those matters which are not subject to regulation by the States." Consequently, subsection (a) not only limits the scope of the definition of "public utility", as defined in the remaining subsections of Section 201, but also, subject to the exceptions referred to

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* The Commission itself has adopted this view in *Matter of The Hartford Electric Light Company*, Opinion No. 58, February 25, 1941 in which it is said:

> "These physical facilities are *only some, but by no means all, of the facilities* used in the sale of electric energy. The entire corporate organization of Hartford, its contracts, its books of account, its instrumentalities for billing and collecting, as well as its electric facilities, are used in the sale of electric energy in interstate commerce" (p. 14). (Emphasis not supplied.)

above (*supra*, pp. 73-74) afforded by Sections 204(f) and 301(a), limits the powers which the Commission may exercise with respect to persons which are concededly "public utilities". Where dual jurisdiction was deemed desirable (*e. g.*, in the matter of keeping accounts and records) it was provided for; in the case of security acquisitions no such provision was made.

Despite the complete preservation of state regulation in the Act, with its corresponding limitation on the jurisdiction of the Federal Power Commission, the substantive provisions of the Act were by no means futile. These provisions dealt, among other things, with interconnection of facilities (Section 202), the disposition of property, consolidations and purchases of securities (Section 203), the issuance of securities (Section 204), and rates and charges (Section 205). Under these and other provisions the Federal Power Commission received a substantial grant of authority, even though the existence of state regulation with respect to a given matter deprived it, *pro tanto*, of jurisdiction which it might otherwise have had over a "public utility". This follows from two important facts: first, with reference to interconnections, rates and rendition of service there were many instances in which, by reason of the doctrine enunciated in the *Attleboro* case, the states were unable to regulate at all; and, second, in many states there was no regulation provided in respect of the matters referred to above. In January, 1941, the Federal Power Commission published a study, based upon data supplied by the state commissions, entitled "State Commission Jurisdiction and Regulation of Electric and Gas Utilities". This study summarized, among other things, the extent of state commission regulation of privately owned electric utilities (including regulation in the District of Columbia). The results of the Federal Power Commis-

sion study with reference to the regulation by the state commissions of the matters indicated above, is shown below:*

	Regulation	No Regulation	No Answer
Rates (residential, commercial, industrial)	41	8	
Rates (other utilities for resale)	41	8	
Rates (others for transmission service only)	35	12	2
Interconnections	34	14	1
Lease or Sale of Facilities	35	13	1
Mergers and Consolidations	34	14	1
Issuance of Securities	31	17	1
Purchases of Voting Stock by other Electric Utilities	28	20	1

In the case at bar, it is clear that the transfer of Jersey Central stock to New Jersey Power was subject to regulation by the State of New Jersey (N. J. S. A. 48:3-7 and 48:3-10). The New Jersey Board of Public Utility Commissioners in a formal proceeding approved such transfer (R. 5-8), and the Court below held that the sale of Jersey Central stock to New Jersey Power "properly was subject to regulation by the State of New Jersey" (R. 1134). In fact, the Court below agreed with petitioners' contention that subsection (a) of Section 201 limits the scope of the Act in the manner here contended, since the Court made the following statement:

> "As we have indicated it was the intention of Congress in passing Part II of the Act to extend

* These data are taken from *State Commission Jurisdiction and Regulation of Electric and Gas Utilities*, Federal Power Commission (1941), Tables IA and IB, pp. 16-19, inclusive.

federal regulation to the transmission of electricity in interstate commerce. *But by Section 201(a) Congress made it plain that such regulation was to extend only to those matters which were not subject to regulation by the states.* The petitioners point out that the transfer of stock with which we are concerned was approved by the Board of Public Utility Commissioners of New Jersey in the exercise of the authority granted to the Commissioners by the law of New Jersey" (R. 1134).

The inevitable conclusion from this construction of the Act would seem to be: Therefore, "Federal regulation" by the Commission does not extend to the stock transfer which gave rise to this proceeding. The Court below, however, reached a contrary conclusion and affirmed the order of the Commission which held that New Jersey Power violated Section 203(a) of the Act in acquiring the stock without authorization of the Commission. In other words, *both* the Federal Power Commission and the Board of Public Utility Commissioners of New Jersey were held to have jurisdiction over the transaction in question. The Court's justification of this extraordinary conclusion is contained in the following extract from its opinion:

> "The sale of the Jersey Central stock to Jersey Power properly was subject to regulation by the State of New Jersey because Jersey Central was engaged in intrastate commerce in that it supplied electricity to local consumers within the State of New Jersey. The sale was subject to the jurisdiction of the Federal Power Commission because Jersey Central is a public utility within the meaning of Section 201(e). We must consider the point of dual control but only insofar as it may be applicable to the appeals at bar, in view of the provisions of Section 201(a) restricting federal regulation, and the legislative history of Part II of the Act.

> The authority of the Board of Public Utility Commissioners of New Jersey must be deemed to be paramount in those matters which may affect the intrastate transmission of electricity and the authority of the Federal Power Commission must be deemed to be governing as to those matters which may affect the transmission of electric energy in interstate commerce. We cannot presume a conflict between the two regulatory bodies upon the issue of whether or not Jersey Power should have bought the stock of Jersey Central. No conflict is shown upon the present record and none may ever come into existence" (R. 1134).

It is respectfully submitted that this reasoning is fallacious. There is nothing in subsection (a) or any other section of the Act which conditions the operation of the limiting clause in subsection (a) on the existence of a conflict between state and federal commissions. The whole point of subsection (a), and the very reason why it was inserted in the Act, is *to prevent any occasion for such conflict from arising*, by providing that the "Federal regulation" undertaken in the Act simply does not extend to matters which are subject to regulation by the states.

An extract from the debate on the floor of the Senate shows how thoroughly it was understood that existing regulation by the States was not to be superseded by the Act.

> "Mr. Borah: I understand that it is not the intention of the framers and proponents of the measure to deal with intrastate matters at all.
>
> "Mr. Wheeler: That is correct.
>
> "Mr. Borah: If the general language used could be construed as dealing with intrastate matters, nevertheless the intention is to confine the operation of the bill to interstate matters?
>
> "Mr. Wheeler: That is entirely correct" (Cong. Record, Vol. 79, Part 8, p. 8431).

"Mr. Wheeler: • • • We preserved the state regulation completely in the bill, but in title II we made the positive statement that the policy should be not to interfere with state regulation, but to assist and help state regulation" (Cong. Record, Vol. 79, Part 8, p. 8775). (Senator Wheeler was Chairman of the Senate Committee on Interstate Commerce.)

The Court below seems to have taken the view that the exercise of jurisdiction by the Federal Power Commission over a stock acquisition already approved by the New Jersey Board would not "interfere with" state regulation unless and until it was shown affirmatively that the Federal Power Commission had refused to approve the transaction. There is nothing in the Act which could form the basis for such a position. Either New Jersey Power was required under Section 203(a) of the Act to secure authorization from the Federal Power Commission to acquire the stock in question, or such authorization was not required. It would be an anomaly to make the test of the Federal Power Commission's jurisdiction depend on whether its decision on the merits of an application made to it accorded with or was at variance with the decision of the New Jersey Board.

The Court below pointed out that it "must consider the point of dual control . . . in view of the provisions of Section 201(a)", but then stated, apparently as indicative of its "consideration", that "The authority of the Board of Public Utility Commissioners of New Jersey must be deemed to be paramount in those matters which may *affect* the intrastate transmission of electricity and the authority of the Federal Power Commission must be deemed to be governing as to those matters which may *affect* the transmission of electric energy in interstate commerce" (R. 1134). Petitioners submit that the Court's reasoning constitutes a *non sequitur*. The Federal Power Act does not

require a showing that the acquisition of Jersey Central stock was related to intrastate or interstate transmission, and the Federal Power Commission did not at any time contend that such a showing was necessary or had any relevance. Section 201(a) is the provision in the Act which *restricts* Federal regulation to matters not subject to regulation by the States. How can it possibly follow—or be of any relevance—that the authority of the New Jersey Board is paramount as to intrastate matters, and that the authority of the Federal Power Commission is governing as to interstate matters? The point of subsection (a) is that even though the Federal Power Commission *might* have been given exclusive or dual control, with the state commissions, Congress *in fact* determined that the regulatory powers of the states should continue to be exclusive, with the exceptions, not relevant here, already alluded to.

The solution of the problem of "dual control" does not require reference to the extraneous matters and issues relied on by the Court. It is simply this:

> (a) Subsection (a) excludes "Federal regulation" over matters subject to regulation by the States.
>
> (b) The transfer of Jersey Central stock to New Jersey Power was subject to regulation by the State of New Jersey.
>
> (c) Hence, no authorization from the Federal Power Commission was required and the judgment of the Court below, as well as the determination by the Commission, should be reversed and set aside.

Conclusion.

Jersey Central is not a "public utility" and is not subject to regulation by the Commission, in view of the terms of the Act, its legislative history, a comparison of the

Act with other statutes, and the relevant decisions of this Court. Moreover, even if Jersey Central were a "public utility", no authorization of the Commission was required for the stock acquisition in question, since such acquisition was subject to regulation by and was approved by the appropriate regulatory body of the State of New Jersey. The judgments of the Court below should be reversed and set aside.

Respectfully submitted,

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